89-1718

In the Supreme Court of the United States

OCTOBER TERM, 1990

NORTHWEST FOOD PROCESSORS ASSOCIATION, a nonprofit association, *et al.*,
Petitioners,

v.

WILLIAM K. REILLY, Administrator, United States Environmental Protection Agency,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHWEST FOOD PROCESSORS ASSOCIATION, a nonprofit association; TUALATIN VALLEY FRUIT MARKETING, INC., an Oregon corporation; AMERICAN FROZEN FOOD INSTITUTE, a nonprofit association; JAMES M. LOVE, Plaintiffs-Appellants-Cross-Appellees, and DAVE FROHNMAYER, Attorney General for the State of Oregon, on behalf of the People of the State of Oregon, Plaintiff-Intervenor, vs. WILLIAM K. REILLY, Administrator, Defendant-Appellee,	Nos. 88-4339, 88-4389 D.C. No. CV 88-641-R

DAVID ALVAREZ; ALICIA PRIETO; CRISTINA ESQUIVEL, et al.,; NATIONAL COALITION AGAINST THE MISUSE OF PESTICIDES; NORTHWEST COALITION AGAINST PESTICIDES; NATURAL RESOURCES DEFENSE COUNCIL; UNITED FARMWORKERS UNION OF WASHINGTON STATE; PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, INC.,	)	
Defendants-Intervenors-Appellees-Cross-Appellants.	)	
AMERICAN FROZEN FOOD INSTITUTE, a nonprofit association,	)	No. 88-7216
Petitioners,	)	FIFRA No. 590
vs.	)	ORDER
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; WILLIAM K. REILLY, Administrator,	)	
Respondents.	)	

[Filed December 8, 1989]

Before: CANBY, THOMPSON and LEAVY, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the

suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a hearing en banc is REJECTED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHWEST FOOD PROCESSORS ASSOCIATION, a nonprofit association; TUALATIN VALLEY FRUIT MARKETING, INC., an Oregon corporation; AMERICAN FROZEN FOOD INSTITUTE, a nonprofit association; JAMES M. LOVE, *Plaintiffs-Appellants-Cross-Appellees,*	)	
and	)	
DAVE FROHNMAYER, Attorney General for the State of Oregon, on behalf of the People of the State of Oregon, *Plaintiff-Intervenor,*	)	Nos. 88-4339, 88-4389
v.	)	D.C. No. CV 88-641-RE
WILLIAM K. REILLY, Administrator, *Defendant-Appellee,*	)	
DAVID ALVAREZ; ALICIA PRIETO; CRISTINA ESQUIVEL, et al.; NATIONAL COALITION AGAINST THE MISUSE OF PESTICIDES; NORTHWEST COALITION AGAINST PESTICIDES; NATURAL RESOURCES DEFENSE COUNCIL; UNITED FARMWORKERS UNION OF WASHINGTON STATE; PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, INC., *Defendants-Intervenors-Appellees-Cross-Appellants.*	)	

Appeal from the United States District Court
for the District of Oregon
James A. Redden, District Judge, Presiding

AMERICAN FROZEN FOOD INSTITUTE, a nonprofit association, *Petitioners,*	)	No. 88-7216
v.	)	FIFRA No. 590
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; WILLIAM K. REILLY, Administrator, *Respondents.*	)	OPINION

Petition for Review of a Decision of the
United States Environmental Protection Agency

Argued and Submitted
March 9, 1989--Portland, Oregon

Order Filed March 20, 1989
Opinion Filed September 27, 1989

Before: Otto R. Skopil, Jr., William C. Canby, Jr. and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Environmental Law

Affirming a decision by the Environmental Protection Agency Administrator, the court held that a cancellation order must be upheld if it is supported by substantial evidence when considered on the record as a whole.

This appeal was a consolidation of three cases all involving a decision by the EPA Administrator to cancel the registrations for the herbicide dinoseb. All the registrations held by registrants who did not request a cancellation hearing or who withdrew their requests were cancelled automatically. Only Cedar Chemical Corporation and Drexel Chemical Company contested the proposed cancellation. While the cancellation proceedings were pending, Cedar and Drexel entered into a settlement agreement with the EPA that among other things provided for the limited use of existing dinoseb stocks. The Administrative Law Judge approved the settlement, and the Administrator affirmed the ALJ's decision. In response, the Northwest Food Processors Association, James Love, Tualatin Valley Fruit Marketing, Inc., and American Frozen Food Institute (producers)

filed a complaint in the district court and a petition for review with the court. The Natural Resources Defense Council, the National Coalition for Alternatives to Pesticides, and others intervened in the district court action, affirming the cancellation order, but challenging the continued use of existing stocks.

[1] The Administrator argued that as a matter of law, once both the remaining dinoseb registrants agreed to the cancellation of their registrations, he had no obligation to conduct further analyses or proceedings pertaining to the cancellation order. The Administrator also contended that the Federal Insecticide, Fungicide, and Rodenticide Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654, does not give nonregistrant users the right to prevent a settlement and force further proceedings once the registrants have agreed to abandon their registrations. *McGill v. EPA*, 593 F.2d. 631 (5th Cir. 1979), directly supports the Administrator's position. The court affirmed the cancellation order.

[2] Both the processors and the NCAP challenged the existing stocks provision of the cancellation order, the processors arguing for wider use and NCAP arguing that all use of existing stocks should be prohibited. **[3]** The processors' arguments were not persuasive, and the EPA

adequately justified its crop specific restrictions on the use of existing stocks. [4] While some of NCAP's criticisms might be valid, the immediate discontinuance in the Pacific Northwest of the use of dinoseb on all crops could have significant adverse economic conditions in the area. [5] Also, the Administrator approved the existing stocks provisions as part of a unitary settlement agreement negotiated between the EPA and the two remaining registrants. The procedural posture of the case forced the Administrator to choose between accepting the settlement including the existing stocks provisions or rejecting the settlement and risking the outcome of a formal cancellation hearing on the other. The latter option entailed the risk that cancellation might be denied.

COUNSEL

Susan K. Eggum, McEwen, Gisvold, Rankin & Stewart, Portland, Oregon, for the plaintiffs-appellants-cross-appellees.

Eileen T. McDonough, United States Department of Justice, Environmental Defense Section, Washington, D.C., for the defendant-appellee.

Victor M. Sher, Sierra Club Legal Defense Fund, Seattle, Washington, for the respondents-intervenors-appellees-cross-appellants.

OPINION

THOMPSON, Circuit Judge:

These three consolidated cases all involve a decision by the Environmental Protection Agency Administrator ("the Administrator") to cancel the registrations for the herbicide dinoseb. Because of the urgent circumstances, we sustained the Administrator's decision without a published opinion. *See Northwest Food Processors Ass'n v. Reilly*, 869 F.2d 542 (9th Cir 1989). We now explain the basis for our decision.

FACTS AND PROCEDURAL HISTORY

In October of 1986, the Administrator issued a notice of his intent to cancel all dinoseb registrations and an emergency suspension order "prohibiting the sale, distribution and use of dinoseb pending completion of the cancellation proceedings." *Love v. Thomas*, 858 F.2d 1347, 1350 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1932 (1989). All the registrations held by registrants who did not request a cancellation hearing or who withdrew their requests were cancelled automatically. By November 1986, Cedar Chemical Corp. ("Cedar") and Drexel Chemical Co. ("Drexel") were the only registrants contesting the proposed cancellation.

During the pendency of the cancellation proceedings, several parties also involved in this case challenged the Administrator's suspension order. This court held that "the emergency suspension order was arbitrary and capricious, an abuse of discretion, and was not issued in accordance with" the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). *Love*, 858 F.2d at 1363.

In March 1988, while the cancellation proceedings were still pending, Cedar and Drexel entered into a settlement agreement with the EPA providing for: (1) the cancellation of the remaining dinoseb registrations, (2) the limited use of existing stocks of dinoseb and (3) the indemnification of certain holders of dinoseb products. The Administrative Law Judge ("ALJ") granted Cedar, Drexel and EPA's motion for an accelerated decision and approved the settlement. After considering and rejecting various objections to the settlement, the Administrator affirmed the ALJ's decision.

In response to the ALJ's decision, Northwest Food Processors Association, James Love, Tualatin Valley Fruit Marketing, Inc. and the American Frozen Food Institute ("AFFI") simultaneously filed a complaint in district court and a petition for review in this court. For convenience, we refer to this group of parties as "the processors." Of

the processors, only AFFI remains a party to the petition for review.

The Natural Resources Defense Council, National Coalition for Alternatives to Pesticides, United Farm Workers Union of Washington, Pineros y Campesinos Unidos Del Noroeste, Davide Alvarez, Alicia Prieto, and Christina Esquivel (collectively "NCAP") intervened in the district court action. They supported the cancellation order, but challenged the continued use of existing stocks. The processors have not appealed the district court's order allowing NCAP to intervene in the district court action. Later, NCAP filed an untimely motion to intervene in the processors' petition for review filed in this court.[1]

The district court ruled in favor of the Administrator on all counts. The processors appealed and NCAP filed a timely cross-appeal. The appeal, cross-appeal and petition for review have been consolidated for review.

JURISDICTION

We review jurisdictional issues de novo without giving deference to the Administrator's "construction of

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[1] We reject NCAP's request for additional time to file its motion to intervene and deny the motion to intervene as untimely.

the judicial review provisions of FIFRA." *Love*, 858 F.2d at 1352 n.9. This consolidated appeal presents two jurisdictional issues. We first consider our jurisdiction to review the cancellation decision.

7 U.S.C. § 136n controls judicial review of the Administrator's decisions under FIFRA. Section 136n provides:

> (a) *District Court Review.*--Except as otherwise provided in this subchapter, the refusal of the Administrator to cancel or suspend a registration or to change a classification not following a hearing and other final actions of the Administrator not committed to the discretion of the Administrator by law are judicially reviewable by the district courts of the United States.[2]
>
> (b) *Review by court of appeals.*--In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely

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[2] In October 1988, Congress amended section 136n(a). *See* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, § 801, 102 Stat. 2654, 2682 (1988). The amended text of 136n(a) has been reprinted above. The amendments are technical and do not affect our reasoning.

> affected by such order and who had been a party to the proceedings may obtain judicial review by filing [a petition] in the United States court of appeals . . . . Upon the filing of such petition the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part. . . .

7 U.S.C. § 136n (Supp. IV 1986 & Oct. 25, 1988 amendments). The processors argue that section 136n(b) is inapplicable, and thus we lack jurisdiction, because the Administrator refused to hold a "public hearing."

We conclude that 136n(b)'s public hearing requirement is satisfied when the EPA conducts proceedings in which interested parties are afforded an opportunity to present their positions by written briefs and a sufficient record is produced to allow judicial review. *Environmental Defense Fund, Inc. v. Costle*, 631 F.2d 922, 926-32 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *see also Humane Soc'y of the United States v. EPA*, 790 F.2d 106, 110-12 (D.C. Cir. 1986). In the present case, the Administrator considered the ALJ's decision, together with various parties' written exceptions to the decision, objections to the settlement, and responses in support of the decision and settlement. The proceedings were

conducted pursuant to notice. The Administrator prepared and filed a comprehensive Final Order approving the settlement. The administrative record is adequate to permit judicial review. The proceedings qualified as a "public hearing" and we have jurisdiction. *Costle*, 631 F.2d at 932.[3]

Having concluded that we have jurisdiction to review the cancellation decision, we now consider our jurisdiction to review the existing stocks provisions which were incorporated into the Administrator's final order.

In his final decision approving the settlement, the

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[3] The processors' argument to the contrary is unpersuasive. They rely primarily on our decision in *Amvac Chemical Corp. v. United States Environmental Protection Agency*, 653 F.2d 1260 (9th Cir. 1981). *Amvac* is inapposite. *Amvac* expressly limited its holding to cases involving preliminary procedural questions rather than final substantive questions. *Id.* at 1263. And *Amvac* implicitly limited its holding to cases which do not turn on questions of statutory interpretation. *Id.* at 1265 (distinguishing *Costle* because *Costle* "turned ultimately on statutory interpretation"). The critical question concerning the dinoseb cancellation decision is: what are the rights of nonregistrant pesticide users after all of the registrants have acquiesced in the termination of their registrations. The answer to this substantive question turns on our construction of FIFRA.

Administrator determined that, under FIFRA, the existing stocks issues were not legally a part of the cancellation hearing. *In re Cedar Chem. Co.*, FIFRA Nos. 590 et al., slip op. at 8 n.9 (June 9, 1988).[4] "[E]xisting stocks can be included in a FIFRA cancellation hearing" only when "the notice calling the hearing voluntarily identifies and includes existing stocks as an issue for examination." *Id.* In the present case, "the notice calling the hearing did not identify existing stocks as being among the issues for resolution at the hearing." *Id.*

We hold that this construction of FIFRA's notice requirement by the Administrator is reasonable and, therefore, controlling. *See Mesa Verde Constr. Co. v. Northern California Dist. Council of Laborers*, 861 F.2d 1124, 1135 (9th Cir. 1988) (en banc) (discussing our deference to the construction of statutes by agencies). Moreover, the contrary result would be very unfair to NCAP. The notice of intent to cancel did not even hint that NCAP's interests could be adversely affected by an existing stocks order resulting from the cancellation hearing. *See* 51 Fed.

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[4] Nonetheless, the Administrator decided that he could, as an exercise of his discretionary powers, consider the objections to the existing stocks provisions which were raised by AFFI and the environmental groups. *Id.* at 9-13 ("AFFI"); *id.* at 13-15 (the environmental groups).

Reg. 36,650 (1986); *cf. Costle*, 631 F.2d at 924-25 (cancellation notice informed the environmentalists that the Administrator intended to permit certain uses of the pesticide to continue).

Because the existing stocks provisions were not legally a part of the cancellation hearing, the provisions cannot be considered part of an order "following a public hearing" within the meaning of 7 U.S.C. § 136n(b). Normally, as an order not following a public hearing, jurisdiction to review the existing stocks provisions would lie in the district court. 7 U.S.C. § 136n(a); *cf. National Coalition Against the Misuse of Pesticides v. Environmental Protection Agency*, 867 F.2d 636, 642 (D.C. Cir. 1989) (review of existing stocks provisions originated in the district court). However, a bifurcated review of the cancellation provision and the existing stocks provisions would frustrate Congress' goal of efficient judicial review. Therefore, we accept the Administrator's invitation to transfer original jurisdiction over NCAP's cross complaint to our court under 28 U.S.C. § 1631 (1982) and to take jurisdiction pursuant to the type of ancillary jurisdiction described in *Abramowitz v. EPA*, 832 F.2d 1071 (9th Cir. 1987) and *Kamp v. Hernandez*, 752 F.2d 1444 (9th Cir.), *modified*, 778 F.2d 527 (1985). *See Gioda v.*

Saipan Stevedoring Co., 855 F.2d 625, 629 (9th Cir. 1988) (discussing the requirements for such transfers); *In re McCauley*, 814 F.2d 1350, 1350-51 (9th Cir. 1987); S. Rep. No. 275, 97th Cong. 2d Sess. 11, 1982 U.S. Code Cong. & Admin. News 11, 21 (explaining the purpose of section 1631).[5]

MERITS

A. *The Cancellation Provisions*

The processors challenge the cancellation order on the ground that the EPA has not developed a record sufficient to justify its decision to cancel.

We must sustain the Administrator's cancellation order if the order "is supported by substantial evidence when considered on the record as a whole." 7 U.S.C.

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[5] Both *Abramowitz* and *Kamp* involved the interpretation of the jurisdictional provisions of the Clean Air Act. These cases held that "when the challenge to agency action [which would otherwise be within the district court's jurisdiction] is 'embedded in a challenge to the validity of an implemental plan,' jurisdiction lies in the circuit court reviewing the implementation plan." *Abramowitz*, 832 F.2d at 1076 (quoting *Kamp*, 752 F.2d at 1454). In *Kamp* and *Abramowitz*, we took jurisdiction over matters otherwise destined for the district court because "[t]o hold otherwise would create 'a danger that two proceedings involving essentially the same agency action could occur simultaneously.'" *Abramowitz*, 832 F.2d at 1076 (quoting *Kamp*, 752 F.2d at 1454).

§ 136n(b) (Supp. IV 1986). And we must give considerable weight to the Administrator's interpretation of FIFRA. *See Mesa Verde*, 861 F.2d at 1135 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)); *see also Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987). Once we determine that a "statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based upon a permissible construction of the statute." *Mesa Verde*, 861 F.2d at 1135 n.11.

[1] The Administrator argues that, as a matter of law, once both of the remaining dinoseb registrants agreed to the cancellation of their registrations, the Administrator had no obligation to conduct further analyses or proceedings pertaining to cancellation. The Administrator contends that FIFRA does not give nonregistrant users (the processors in our case) the right to prevent a settlement and force further proceedings, once the registrants have agreed to abandon their registrations. We agree. The Fifth Circuit's decision in *McGill v. EPA*, 593 F.2d 631, 636-37 (5th Cir. 1979), directly supports the Administrator's position.

Moreover, the interpretation advanced by the

Administrator and the analysis by the Fifth Circuit in *McGill* are consistent with FIFRA and the 1988 amendments. *See generally* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654 (1988). We affirm the cancellation decision.

B. *The Existing Stocks Provisions*

[2] Both the processors and NCAP challenge the existing stocks provisions of the cancellation order. The processors contend that the Administrator erred by not permitting a wider use of existing stocks. NCAP contends the Administrator erred by not prohibiting all use of existing stocks.

"The Administrator may permit the continued sale and use of existing stocks of a pesticide whose registration is canceled . . . to such extent, under such conditions, and for such uses as he may specify if he determines that such sale or use is not inconsistent with the purposes of this subchapter and will not have unreasonable adverse effects on the environment." 7 U.S.C. § 136d(a)(1) (as modified by the technical 1988 amendment). "The term 'unreasonable adverse effects on the environment' means any unreasonable risk to man or the environment, taking into account the economic,

social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb).

Under the substantial evidence standard, we must affirm the Administrator's finding "where there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' even if it is possible to draw two inconsistent conclusions from the evidence." *St. Elizabeth Community Hosp. v. Heckler*, 745 F.2d 587, 592 (9th Cir. 1984). "Although the substantial evidence standard of review is relatively deferential to the agency factfinder, our review still must be 'searching and careful, subjecting the agency's decision to close judicial scrutiny.'" *Containerfreight Corp. v. United States*, 752 F.2d 419, 422 (9th Cir. 1985).

[3] The processors' arguments that a wider use of existing stocks should have been permitted are not persuasive and, for the most part, are moot because the 1988 growing season had passed prior to our previously published decision in this case. *See Northwest Food Processors Ass'n v. Reilly*, 869 F.2d 542 (9th Cir. 1989). Moreover, the EPA adequately justified its crop specific restrictions on the use of existing stocks. In particular, the EPA provided ample justification for singling out caneberries in the 1989 season. After a careful review of

the record, we conclude that substantial evidence supports the Administrator's decision to restrict the use of existing stocks to the specified crops.

NCAP supports its arguments against any use of existing stocks by identifying several alleged flaws in the EPA's analysis. NCAP contends these flaws caused the EPA to underestimate the risk of continued dinoseb use.

[4] While some of NCAP's criticisms may be valid, after reviewing the records as a whole, we conclude that substantial evidence supports the Administrator's decision to permit the use of existing stocks. First, the immediate discontinuance of the use of dinoseb on all crops in the Pacific Northwest could have significant adverse economic consequences for the region. *See Love*, 858 F.2d at 1351-52. In *Love*, we reversed the EPA's emergency suspension order because the Administrator had failed to consider these economic consequences. *Id.* at 1360-62. In light of *Love*, the Administrator's special provisions for the limited use of existing stocks of dinoseb on specified crops during the 1988 and 1989 growing seasons seem reasonable.

[5] Second, the Administrator approved the existing stocks provisions as part of a unitary settlement agreement negotiated between the EPA and the two

remaining dinoseb registrants. The procedural posture of the case forced the Administrator to choose between accepting the settlement agreement including the existing stocks provisions on the one hand, or rejecting the settlement and risking the outcome of a formal cancellation hearing on the other. The latter option entailed the risk that cancellation might be denied. *Cf. Love*, 858 F.2d at 1358 (overturning the Administrator's order suspending the use of dinoseb). And even if successful, proceeding with a full cancellation hearing could have involved months or years of delay before the registrations were actually cancelled, if indeed they ever were. Presumably, given our decision in *Love*, the production and use of dinoseb might continue pending entry of a final cancellation order.

In this context, the Administrator could reasonably conclude that approving the entire settlement agreement, even with the provisions permitting the limited use of existing stocks of dinoseb during the 1988 and 1989 growing seasons, would result in a lower level of dinoseb use than would be the case if the settlement were rejected and the matter proceeded to a full cancellation hearing.

The D.C. Circuit recently reached a similar con-

clusion in *National Coalition Against the Misuse of Pesticides v. Environmental Protection Agency*, 867 F.2d 636, 642 (D.C. Cir. 1989). As the D.C. Circuit explained: "If entering into a settlement [which allows the use of existing stocks] provides for less use than would be the case if the Administrator initiated formal cancellation proceedings, it seems rather obvious that the settlement, at minimum, meets the statutory test of reasonableness." *Id.*

In summary, we conclude that the Administrator's decision to accept the existing stocks provisions is supported by substantial evidence. Therefore, we sustain the Administrator's existing stocks order.[8]

AFFIRMED.

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[8] The parties raise a number of other issues in their briefs and other pleadings filed with this court. These issues do not merit separate discussion.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOOD PROCESSORS ASSOCIATION, a non-profit association, JAMES M. LOVE, TUALATIN VALLEY FRUIT MARKETING, INC., an Oregon corporation, AMERICAN FROZEN FOOD INSTITUTE, a non-profit association, Plaintiffs-Appellants, and DAVE FROHNMAYER, Attorney General for the State of Oregon, on behalf of the People of the State of Oregon, Plaintiff-Intervenor,	Civil No. 88-641-RE NOTICE OF APPEAL

v.

LEE M. THOMAS, Administrator, Environmental Protection Agency,

Defendant-Appellee,

and

NATIONAL COALITION AGAINST THE MISUSE OF PESTICIDES; NORTHWEST COALITION AGAINST PESTICIDES; NATURAL RESOURCES DEFENSE COUNCIL, INC.; UNITED FARMWORKERS UNION OF WASHINGTON STATE; PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, INC.; CRISTINA ESQUIVEL; ALICIA PRIETO; DAVID ALVAREZ,

Defendants-Intervenors.

Notice is hereby given that plaintiffs appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 5th day of October, 1988.

Dated this 10th day of November, 1988.

McEWEN, GISVOLD, RANKIN & STEWART

/s/ Susan K. Eggum
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOOD PROCESSORS ASSOCIATION, a non-profit association, JAMES M. LOVE, TUALATIN VALLEY FRUIT MARKETING, INC., an Oregon corporation, and AMERICAN FROZEN FOOD INSTITUTE, a non-profit association,

Plaintiffs,

and

DAVE FROHNMAYER, Attorney General for the State of Oregon, on behalf of the people of the State of Oregon,

Plaintiff-Intervenor,

v.

LEE M. THOMAS, Administrator, Environmental Protection Agency,

Defendant.

Civil No. 88-641-RE

AMENDED ORDER

and

DAVID ALVAREZ, ALICIA PRIETO, CHRISTINA ESQUIVEL, UNITED FARM WORKERS UNION OF WASHINGTON, PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, THE NATIONAL COALITION AGAINST THE MISUSE OF PESTICIDES, THE NATURAL RESOURCES DEFENSE COUNCIL, and THE NORTHWEST COALITION AGAINST PESTICIDES,

Defendant-Intervenors

[Filed October 4, 1988]

REDDEN, Judge:

The following Order amends my September 28, 1988 Order in this case. IT IS HEREBY ORDERED that defendant Thomas' motion for summary judgment is GRANTED in its entirety. IT IS FURTHER ORDERED that defendant Thomas' motion to strike is DENIED. IT IS FURTHER ORDERED that defendant-intervenors' motion for summary judgment is GRANTED on the issue of subject matter jurisdiction but DENIED on the remaining issues. IT IS FINALLY ORDERED that judgment shall enter against plaintiff-intervenor as well.

Dated this 4th day of October, 1988.

/s/ James A. Redden
James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOOD PROCESSORS ASSOCIATION, a non-profit association, JAMES M. LOVE, TUALATIN VALLEY FRUIT MARKETING, INC., an Oregon corporation, and AMERICAN FROZEN FOOD INSTITUTE, a non-profit association,

Plaintiffs,

and

DAVE FROHNMAYER, Attorney General for the State of Oregon, on behalf of the people of the State of Oregon,

Plaintiff-Intervenor,

v.

LEE M. THOMAS, Administrator, Environmental Protection Agency,

Defendant.

and

Civil No. 88-641-RE

OPINION

DAVID ALVAREZ, ALICIA PRIETO, CHRISTINA ESQUIVEL, UNITED FARM WORKERS UNION OF WASHINGTON, PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, THE NATIONAL COALITION AGAINST THE MISUSE OF PESTICIDES, THE NATURAL RESOURCES DEFENSE COUNCIL, and THE NORTHWEST COALITION AGAINST PESTICIDES,

Defendants-Intervenors.

[Filed October 4, 1988]

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REDDEN, Judge:

This is an action to enjoin enforcement of a July 21, 1988 cancellation order by the Administrator of the Environmental Protection Agency (the Administrator). Various parties move for summary judgment on various claims. The order cancelled all registrations to manufacture the pesticide "dinoseb" (the cancellation order), but allowed the sale, distribution and use of the pesticide on certain crops for a limited period of time (the existing stock provision).

On June 17, 1988, I granted plaintiffs' motion for a preliminary injunction, and have since granted a motion to intervene made on behalf of several farmworkers and organizations. These defendant-intervenors cross-claim against defendant Thomas and seek to enjoin enforcement of the existing stock provision.

Defendant Thomas moves for summary judgment on all claims. Defendant-intervenors move for summary judgment on the cancellation order and on their cross-claim against defendant Thomas. I grant defendant Thomas' motion in its entirety, grant in part and deny in part defendant-intervenors' motion on their cross-claim.

BACKGROUND

The preliminary injunction referred to above arose out of plaintiffs filing for such on June 10, 1988 and a hearing held prior to the ruling on June 17, 1988. The reasoning of the following Opinion is in many respects inconsistent with my reasoning leading to the grant of the preliminary injunction. The June motion was, of course, argued at the crucial moment in the growing season for the involved crops, as was the case in *Love v. Thomas*, 838 F.2d 1059 (1988). The irreparable harm argument was significant in both of those instances, as was the need to rule hurriedly on issues arising out of the interpretation of a complex statute. I believed then, and believe now that the Administrator went "end around" and thereby avoided complying with the detailed requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, but have concluded that such is an option which the Administrator may legally choose under that statute.

Additional background facts and details on this continuing saga are available in *Love v. Thomas, supra*, as well as in the earlier filings in the case at bar.

Two dinoseb registrants, Cedar Chemical Corp. and Drexel Chemical Co., settled with the Agency and joined

in a motion for the Administrative Law Judge (ALJ) to enter an accelerated decision in the Agency's favor. The ALJ granted the motion. Plaintiff American Frozen Food Institute (AFFI) opposed the cancellation and filed exceptions in which it sought an evidentiary hearing. Plaintiff Northwest Food Processors Association (NWFPA) which also opposed cancellation sought leave to file exceptions. In addition, several public interest and farm worker groups (presumably allied with if not identical to defendant-intervenors) sought leave to file exceptions.

The Administrator denied AFFI's exceptions and NWFPA's and the farm workers' motions to file exceptions. The Administrator did discuss the farm workers' concerns regarding the existing stock provision.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. *T.W. Electrical Service v. Pacific Electrical Contractors Ass'n*, 809

F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable party could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, then the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Celotex*, 477 U.S. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical*, 809 F.2d at 630.

DISCUSSION

The motions address both procedural and substantive issues and I address the procedural issues first.

In addition to these motions, defendant moves to strike various plaintiffs' exhibits which were submitted in

support of their opposition to the motion. Defendant urges that I strike these exhibits because the court cannot go beyond the administrative record. I deny the motion.

A. Procedural Issues

1. Jurisdiction

Defendant-intervenors move for summary judgment on grounds of subject matter jurisdiction and standing, and defendant Thomas incorporated his similar earlier motion to dismiss on the jurisdictional grounds.

FIFRA grants jurisdiction to either the district court or the court of appeals depending on whether the administrator has held a public hearing. If the administrator cancels a registration after a hearing, the court of appeals has jurisdiction. 7 U.S.C. § 136n(a). If there has been no hearing, the district court has jurisdiction and may receive evidence outside the administrative record. 7 U.S.C. § 136n(b). *See Love v. Thomas, supra.*

Here, defendant Thomas and the defendant-intervenors argue that the Administrator issued the cancellation order following a public hearing. According to these parties, the hearing was limited to document submissions. The cancellation order indicates that the Administrator reviewed the following

documents: the joint motion of the Agency and the two settling registrants; exceptions filed by various groups including plaintiffs AFFI and NWFPA; the Agency's rationale for settlement; and AFFI's opposition to the rationale for settlement. Following this review and based upon *McGill v. Environmental Protection Agency*, 593 F.2d 631, 636-37 (5th Cir. 1979), the Administrator concluded that plaintiff AFFI did not, as a matter of law, have a right to a hearing and denied its petition. Based upon this conclusion, the Administrator approved the settlement and issued the cancellation order.

I now conclude that the hearing was adequate to decide the legal question of whether nonregistrant users can require an evidentiary hearing after the agency has settled with all of the registrants. Although I viewed the issue as procedural, and governed by *AMVAC Chemical Corp. v. United States Environmental Protection Agency*, 653 F.2d 1260 (9th Cir. 1980), I am now convinced that the issue is substantive and governed by *Environmental Defense Fund v. Costle*, 631 F.2d 922 (D.C. Cir. 1980). *But see AMVAC*, 653 F.2d at 1265-66 (J. Goodwin dissenting) (rejecting the majority's procedural/substantive distinction). Further, the current record is adequate to determine the legal question without additional fact

finding. The appellate court is, therefore, the appropriate forum.

The status of plaintiffs AFFI and NWFPA is, at the strongest, that of persons adversely affected by the cancellation. 7 U.S.C. § 136d(3). The regulations promulgated thereunder, 40 C.F.R. §§ 164.121(e)(3), 164.131(a), (b), do not provide such persons with the right to an evidentiary hearing. Rather such persons may submit written documents in support of their motion but the Administrator need not allow oral argument or examination.

Because the Administrator based the cancellation order on a legal principle and because the record is sufficient for an appellate court to resolve the issue, I hold that I am without jurisdiction pursuant to 7 U.S.C. § 136n(a) or 5 U.S.C. § 702. There is no allegation that jurisdiction exists under 7 U.S.C. § 136n(c), and I do not address that issue.

2. Standing

Defendant-intervenors contend that plaintiffs are without standing to contest the cancellation order. FIFRA, 7 U.S.C. § 136d(c)(3), and the regulations thereunder, 40 C.F.R. § 164.121(2)(e)(3), provide that persons who are adversely affected and who file a

motion to intervene regardless of whether the motion is granted, have the rights of a party to the action. Because the parties, e.g., the settling registrants, would have standing to contest, the plaintiffs do as well.

B. Substantive

Assuming, arguendo, that my earlier ruling on jurisdiction was correct, I now set out my reasons for ruling today that the Administrator correctly issued the cancellation order. As indicated in the June 17, 1988 Opinion, the standard of review is whether the agency's action is found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. I consider separately the cancellation order and the existing stock provision.

1. The Cancellation Order

The Administrator concluded that nonregistrant users had no right to a hearing when the registrants have entered into a voluntary settlement pledging to refrain from concurring in any request for a hearing by nonregistrants. The Administrator relied on *McGill v. Environmental Protection Agency*, 593 F.2d 631 (5th Cir. 1979), concluding that the case made good sense because such a settlement rendered any balancing of the benefits and risks superfluous. This, because regardless of the

results of such analysis, the former registrants had agreed not to manufacture and could not be compelled to do so.

I owe considerable deference to the Administrator's interpretation of FIFRA. *See Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984). Moreover, I find the Administrator's interpretation and reliance on *McGill* reasonable. *McGill* is virtually the only decision on this particular point, and the *McGill* court's interpretation provides a sensible resolution to a gap in FIFRA.

The Administrator's interpretation is reasonable. Plaintiffs have failed to demonstrate the action was arbitrary or capricious. I grant defendant's motion as to the cancellation order.

2. The Existing Stock Provision

FIFRA provides that the Administrator may permit continued sale and continued use of a pesticide whose registration is cancelled, if he determines that such sale or use is not inconsistent with the purposes of the statute and will not have unreasonable adverse effects on the environment. 7 U.S.C. § 136(a)(1). Here, the Administrator found that the existing stock provision proposed by the Agency addressed all relevant con-

siderations and performed the balancing of risks and benefits. Plaintiffs and defendant-intervenors have two separate criticisms of the existing stock provision.

Plaintiffs urge that the provision is too narrow and that the Agency acted unreasonably in limiting the use of the pesticide to certain crops. However, as the Agency's rationale indicated, the limitations are necessary because no effective alternatives existed for certain crops. Following its analysis of the benefits and risks, the Agency recommended short term continued use on such crops and the Administrator agreed.

The Administrator did not abuse his discretion by limiting the use to certain crops for a limited time.

Defendant-intervenors argue that the existing stock provision is too broad and that any use of such a chemical is too much. The Administrator, however, did address these concerns and concluded that the risk/benefit analysis weighed slightly in favor of short term continued use on certain crops and subject to rigorous restrictions. Defendant-intervenors contend that the Administrator failed to consider the serious risks involved and failed to consider one certain alternative. I find that the Administrator considered these risks as well as several alternatives in his analysis. Defendant-

intervenors offer no authority that failure to consider one alternative constitutes an abuse of discretion. I may not agree with the Administrator's assessment, but I am unpersuaded that he abused his discretion by failing to consider the safety risks.

Neither plaintiffs nor defendant-intervenors have shown that the Administrator acted arbitrarily or capriciously in approving the existing stock provision. I grant defendant's motion on the existing stock provision.

CONCLUSION

I conclude that I lack subject matter jurisdiction to decide this dispute. The court of appeals is the appropriate forum.

Alternatively, assuming I have jurisdiction, I find that the Administrator did not abuse his discretion in approving the cancellation order with the existing stock provision. Accordingly, I grant defendant's motion for summary judgment. In addition, I grant defendant-intervenors' motion for summary judgment in part and deny it in part as indicated above.

Plaintiff-intervenor makes the same claims under FIFRA. Because I grant the motions against the main action and plaintiff-intervenor offers no independent basis for jurisdiction, judgment shall enter against

plaintiff-intervenor as well. *See Horn v. Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982).

Dated this 4th day of October, 1988.

/s/ James A. Redden
James A. Redden
United States District Judge

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

JAMES M. LOVE; Northwest Food Processors Association; Tualatin Valley Fruit Marketing, Inc.; Plaintiffs-Appellees;

DAVE FROHNMAYER, Attorney General for the State of Oregon, on behalf of the People of the State of Oregon, Intervenor-Appellee;

v.

LEE M. THOMAS, Administrator, United States Environmental Protection Agency, Defendant-Appellant;

American Federation of Labor-Congress of Industrial Organizations; Natural Resources Defense Council, Inc.; United Farmworkers of Washington State; Pineros Y Campesinos Unidos Del Noroeste, Inc.; Christina Esquivel; Diana Guzman; Alicia Prieto; Aurora Leon; Zenaida Prieto; Maria Esquivel; Constancio Martinez; Juan Prieto, Jr.; Enrique Prieto; Antonio Leon; Intervenors.

No. 87-3866

Argued and Submitted July 17, 1987.

Decided January 29, 1988.

As Amended on Denial of Rehearing
and Rehearing En Banc
September 28, 1988.

Farmers and food processors sought preliminary injunction against Environmental Protection Agency's emergency suspension order preventing any further sale, distribution, or use of pesticides containing dinoseb. The United States District Court for the District of Oregon, James A. Redden, J., 668 F.Supp. 1443, granted relief and EPA appealed. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) District Court had jurisdiction; (2) EPA's emergency order was arbitrary and capricious; but (3) District Court's power is limited to staying effectiveness of order and court had no authority to place conditions on the stay.

Affirmed in part, reversed in part, and remanded.

William A. Norris, Circuit Judge, filed a dissenting opinion.

Opinion 833 F.2d 1059 superseded.

John A. Bryson, U.S. Dept. of Justice, Washington, D.C., for defendant-appellant.

Susan K. Eggum, McEwen, Gisvold, Rankin & Stewart, Portland, Or., Phillip D. Chadsey and Charles F. Adams, Stoel, Rives, Boley, Jons & Grey, Portland, Or., for plaintiffs-appellees.

Arden J. Olson, Assist. Atty. Gen., State of Or., for intervenor-appellee.

Albert H. Meyerhoff, Natural Resources Defense Council, Inc., San Francisco, Cal., for intervenors.

Appeal from the United States District Court for the District of Oregon.

Before NORRIS, KOZINSKI and THOMPSON [Judge Thompson was drawn to replace Judge Anderson], Circuit Judges.

KOZINSKI, Circuit Judge:

Farmers and food processors in the Pacific Northwest brought this lawsuit to enjoin the Environmental Protection Agency from suspending registrations of the pesticide dinoseb (2-sec-butyl-4, 6-dinitrophenol). Plaintiffs use products containing dinoseb or its salts in the cultivation of green peas, snap beans, cucurbits and caneberries.[1] As counsel for the State of Oregon dramatically proclaimed at oral argument, this case "essentially is . . . about whether we'll be able to have raspberries next year."

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[1] Snap beans include green beans, wax beans and romano beans. Cucurbits are members of the gourd family, which includes cucumbers, pumpkins, squash and zucchini. Caneberries comprise red raspberries, blackberries, boysenberries and loganberries.

FACTS

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C.A. §§ 136-136y (1980 & Supp. 1987), establishes an elaborate framework for the regulation of pesticide use in the United States. No pesticide may be sold or distributed unless it is registered with the EPA. FIFRA §§ 3(a), 12(a)(1)(A), 7 U.S.C.A. §§ 136a(a), 136j(a)(1)(A). In order to register a pesticide, an applicant, who may be a manufacturer or user of the product, must demonstrate with sufficient scientific evidence that, "when used in accordance with widespread and commonly recognized practice[, the pesticide] will not generally cause unreasonable adverse effects on the environment." FIFRA § 3(c)(5)(D), 7 U.S.C.A. § 136a(c)(5)(D). After a pesticide has been registered, the EPA Administrator must issue a notice of his intent to cancel its registration or change its classification "'whenever there is a substantial question about the safety of a registered pesticide.'" *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292, 1296 n. 4 (D.C. Cir. 1975) (quoting *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 594 (D.C. Cir. 1971); *see* FIFRA § 6(b), 7 U.S.C.A. § 136d(b).

[1] Because cancellation or reclassification proceedings may take one or two years to complete,[2] FIFRA authorizes the Administrator to suspend a pesticide's registration pending the outcome of the proceedings if he determines that suspension "is necessary to prevent an imminent hazard." FIFRA § 6(c)(1), 7 U.S.C.A. § 136d(c)(1).[3] Absent an emergency, the Administrator may not issue a suspension order until he has done two things: (1) notified registrants of the pesticide that he intends to cancel the registration and that he will issue a suspension order based upon "findings pertaining to the question of 'imminent hazard,'" which he must include in the notice; and (2) given registrants an opportunity for an "expedited

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[2] In this case, the Administrator has "assumed that a cancellation hearing concerning the various registered dinoseb products would require approximately 18 months." Decision and Emergency Order Suspending the Registrations of All Pesticide Products Containing Dinoseb, 51 Fed. Reg. 36634, 36635 (EPA Oct. 14, 1986).

[3] "Imminent hazard" is not limited to a crisis: "It is enough if there is substantial likelihood that serious harm will be experienced during the year or two required in any realistic projection of the administrative process." *Environmental Defense Fund, Inc. v. EPA*, 465 F.2d 528, 540 (D.C. Cir. 1972), *quoted in Environmental Defense Fund*, 510 F.2d at 1297.

hearing" on "whether an imminent hazard exists." FIFRA § 6(c)(1), 7 U.S.C.A. § 136d(c)(1).

Dinoseb is a pesticide registered for use as an herbicide, insecticide, fungicide and desiccant, and has been used in the United States for nearly forty years. It is applied primarily as a contact herbicide to control broadleaf weeds and as a desiccant on caneberries to suppress growth that would obstruct harvesting. Decision and Emergency Order Suspending the Registrations of All Pesticide Products Containing Dinoseb, 51 Fed. Reg. 36634, 36635 (EPA Oct. 14, 1986) [hereinafter Emergency Order]; Intent to Cancel and Deny All Registrations for Pesticide Products Containing Dinoseb, 51 Fed. Reg. 36650, 36657-58 (EPA Oct. 14, 1986) [hereinafter Notice of Intent]. In October 1986 there were nearly three hundred federal registrations for pesticides containing dinoseb or its salts.

In the spring of 1986, the EPA developed doubts about the safety of dinoseb. Preliminary studies showed that dinoseb may cause serious health risks to persons exposed to it, including sterility in men and birth defects in the unborn children of pregnant women. Emergency Order, 51 Fed. Reg. at 36636-38. In October 1986, the EPA began proceedings to cancel all dinoseb

registrations. *See* Notice of Intent, 51 Fed. Reg. at 36650. On October 7, the Administrator issued an emergency suspension order under section 6(c)(3) of FIFRA, 7 U.S.C.A. § 136d(c)(3), prohibiting the sale, distribution and use of dinoseb pending the completion of the cancellation proceedings. Emergency Order, 51 Fed. Reg. at 36634, 36648.[4] The order, along with a notice of intent to cancel all registrations, was mailed to the registrants of dinoseb, and was subsequently published in the Federal Register. *Id.* at 36634. Four registrants requested a hearing on the emergency suspension order.[5] The hearing convened on October 20 before an administrative law judge but, for reasons not apparent from the record,

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[4] Six registrants, including the four that initially requested an expedited hearing on the suspension order, have requested cancellation hearings as to 37 registrations; those proceedings are pending. Hearing Concerning Application to Modify the Final Suspension Order for Pesticide Products Containing Dinoseb, 52 Fed. Reg. 4963, 4965 (EPA February 18, 1987) [hereinafter Notice of Hearing]. The rest of the registrations in effect in October 1986 have been cancelled automatically under FIFRA § 6(b), 7 U.S.C.A. § 136d(b).

[5] Uniroyal, Inc., Cedar Chemical Corp., Drexel Chemical Co. and A.H. Marks & Co. filed requests for a hearing on October 14, 15, 20 and 27, 1986, respectively.

the registrants jointly withdrew their requests ten days later.

Plaintiffs, as nonregistrant users of dinoseb, are not permitted by FIFRA to initiate an expedited administrative hearing on the suspension order.[4] However, under EPA regulations they were permitted to and did petition on behalf of growers in Washington, Oregon and Idaho for a so-called "subpart D" reconsideration of the suspension. *See* 40 C.F.R. §§ 164.130-133 (1986).[5] The EPA denied the petitions of

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[4] Nonregistrants may intervene in ordinary suspension hearings. *See* 40 C.F.R. § 164.121(e)(2) (1986) (nonregistrants "may file proposed findings and conclusions and briefs in support thereof"). By statute, however, their intervention in expedited hearings on emergency suspension orders is limited to filing briefs. FIFRA § 6(c)(3), 7 U.S.C.A. § 136d(c)(3).

[5] Under EPA regulations, adversely affected persons may, even without the concurrence of a registrant, petition the Administrator for reconsideration of the suspension order. Under subpart D of 40 C.F.R. pt. 164, petitioner must present substantial new evidence that may materially affect the prior suspension and that could not have been discovered with due diligence before the suspension order. If it meets this threshold, the EPA will conduct an adjudicatory hearing on whether to modify the suspension order as to those growers. Denial of the petition

(continued...)

plaintiff Northwest Food Processors Association and others, supported by applications from the three states, with respect to green peas, snap beans and lima beans on April 1, 1987. *See* Denial of Hearing Concerning Application to Modify the Final Suspension Order for Pesticide Products Containing Dinoseb, 52 Fed. Reg. 11119, 11121 (EPA April 7, 1987). The EPA had not acted with regard to caneberries and cucurbits at the time the district court enjoined enforcement of the suspension order. *See id.* at 11120.

(...continued)
constitutes final agency action subject to review. FIFRA § 16, 7 U.S.C.A. § 136n; 40 C.F.R. § 164.131(b).

Producers of dry peas, chickpeas and lentils in the Palouse region of the Pacific Northwest petitioned for reconsideration. On February 11, 1987, the Administrator granted the subpart D hearing requests as to those three crops grown in Idaho and Washington. *See* Notice of Hearing, 52 Fed. Reg. 4963. On March 30, the Administrator issued his Decision and Final Order Modifying Final Suspension of Pesticide Products Which Contain Dinoseb, and permitted application of dinoseb to those crops in Washington and Idaho with certain restrictions. On April 3, he granted the subpart D hearing request as to those same crops in Oregon. *See* Notice of Hearing Concerning Application to Modify the Final Suspension Order for Pesticide Products Containing Dinoseb, 52 Fed. Reg. 11333, 11335 (EPA April 8, 1987).

On April 3, 1987, with the growing season upon them, plaintiffs rushed into district court seeking relief from the EPA's suspension order. The growers' argument was quite straightforward: They simply could not grow their crops without dinoseb. Unlike farmers in other parts of the country, farmers in the Northwest have no substitutes for dinoseb. Climatic conditions and the prevalence of certain pests, black nightshade in particular, make dinoseb the only effective pesticide available on the market. For example, the farmers argued, without dinoseb there would be no caneberry crop in the Pacific Northwest, where 95 percent of the nation's commercial caneberry crop is grown. Potential crops losses would amount to $39.2 million this year. *See Love v. Thomas*, 668 F.Supp. 1443, 1449-50 (D. Or. 1987) [hereinafter Dist. Ct. op.]; 2 Reporter's Transcript (RT) at 257.

On April 15, 1987, after a two-day hearing, the district court asserted jurisdiction on the basis of section 6(c)(4) of FIFRA, 7 U.S.C.A. § 136d(c)(4). *See* Dist. Ct. op. at 1446, 1447. It then preliminarily enjoined enforcement of the suspension order pending completion of the EPA's cancellation proceedings, and allowed use of dinoseb subject to twelve conditions, *see* pp. 1363-1364 *infra*,

patterning the injunction after the EPA's modification of its suspension order as to certain other crops, *see* p. 1351 n. 7 *supra*. The court permitted limited sales of dinoseb to growers of certain crops; prohibited uncertified applicators from using the pesticide; barred "[w]omen of child-bearing age, i.e., under the age of 45," from "any aspect of dinoseb application"; restricted the manner and extent of application of dinoseb to crops; and set standards for applicator clothing and exposure. *See Love v. Thomas*, No. 87-343-RE, at 2-4 (D. Or. April 15, 1987) [hereinafter Preliminary Injunction], *quoted* at pp. 1362-1363 *infra*.[1] The court entered final judgment on May 1, 1987, and the EPA timely appealed.

THE PARTIES AND THEIR CONTENTIONS

The EPA's appeal is supported by certain intervenors, including various labor unions that represent agricultural workers ("the unions"). Plaintiffs defend the district court's judgment with the support of the State of Oregon, which intervened below.

The EPA argues that the district court lacked

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[1] The restrictions are all designed to protect dinoseb applicators against potential hazards. There is no apparent risk to consumers. *See* 1 RT at 162.

jurisdiction to review the suspension order. On the merits, the EPA argues that the court erred in invalidating the suspension order and enjoining enforcement. The unions support the EPA and in addition argue that the district court's order denied farmworkers equal protection because it treated men and women disparately. Plaintiffs and the State of Oregon vigorously assert that the district court had jurisdiction and urge us to uphold its judgment.

DISCUSSION

I.

[2, 3] The first question we must address is that of jurisdiction.[1] That turns out to be a difficult issue, requiring close analysis of a rather convoluted statutory provision. As noted earlier, when the EPA commences proceedings to cancel the registration of a pesticide, it

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[1] We review de novo the question of judicial review. *Pescosolido v. Block*, 765 F.2d 827, 831 (9th Cir. 1985). We reject appellant's suggestion that we defer to the EPA's construction of the judicial review provisions of FIFRA. While we ordinarily give great weight to the interpretation of the agency charged with enforcement of the statute we are construing, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984), that deference does not extend to the question of judicial review, a matter within the peculiar expertise of the courts.

may, at the same time, issue a notice that it intends to suspend the registration pending the outcome of the cancellation proceedings. Such suspension normally does not become effective immediately. Rather, upon receipt of the notice the registrant has five days within which to request an expedited hearing on the issue of imminent hazard. FIFRA § 6(c)(2), 7 U.S.C.A. 136d(c)(2). If a hearing is requested, the suspension is automatically stayed until the matter has been heard by an administrative law judge and the Administrator, having reviewed his findings, issues a final order. *Id.* But "[i]f no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification . . ., the suspension order may be issued and shall take effect and *shall not be reviewable by a court.*" FIFRA § 6(c)(2), 7 U.S.C.A. § 136d(c)(2) (emphasis added).

[4] Because the expedited hearing may take a month or more,[19] during which time the pesticide could continue to be used, FIFRA provides an exception to this procedure. Where the Administrator determines that an emergency exists, he may issue the suspension order "in

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[19] In this case, the Administrator had "assumed that a suspension hearing would require approximately four months." Emergency Order, 51 Fed. Reg. at 36636.

advance of notification to the registrant." FIFRA § 6(c)(3), 7 U.S.C.A. § 136d(c)(3). If the EPA issues such an emergency order, many of the same procedures apply as with ordinary orders,[11] but the suspension goes into effect immediately and remains in effect pending the result of the expedited hearing.

The statute provides for review in the court of appeals of a suspension order issued following a hearing, notwithstanding the fact that the cancellation proceedings may be continuing before the agency. FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4). As to "[a]ny order of suspension entered prior to a hearing," the statute provides for "immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court." *Id.*[12] The scope of district court review is limited,

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[11] Under subsection (c)(3), only registrants and the agency may participate in the hearing process, although "any person adversely affected may file briefs within the time allotted by the Agency's rules." FIFRA § 6(c)(3), 7 U.S.C.A. § 136d(c)(3). Anyone filing briefs thereby becomes a party to the proceeding for the purpose of seeking judicial review.

[12] Plaintiffs are undoubtedly "interested persons" within the meaning of this section. *See McGill v. EPA*, 593 F.2d

(continued...)

however, to determining whether the order was "arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law." FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4). The district court action, moreover, "may be maintained simultaneously with any administrative review proceeding under [section 6(c)]." *Id.*

The EPA argues that judicial review is barred by section 6(c)(2), which provides, in what the EPA contends are the plainest possible terms, that if the registrants do not request a hearing, the suspension order becomes final and "shall not be reviewable by a court." The district court rejected this contention, noting that this is not a case where the registrants failed to request a hearing: Four registrants in fact asked for an expedited hearing but eventually decided not to go forward with the process. Giving the statute a literal reading, the

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[11](...continued)
631, 635-36 (5th Cir. 1979) (finding that the legislative history of FIFRA strongly suggests that "interested persons" include pesticide users). They sought review with the concurrence of Cedar Chemical Co., one of the registrant manufacturers that had initially requested an expedited hearing. CR 18 ¶ 6; *see* 2 RT at 265, 268.

court held that judicial review is not barred. *See* Dist. Ct. op., 668 F. Supp. 1447.

Plaintiffs do not rely on the district court's rationale. Instead, they point to the language of section 6(c)(4), which deals expressly with judicial review.[3] In that section Congress provides for judicial review of two types of suspension orders, those entered after and those entered before a hearing. The latter category, plaintiffs argue, defines emergency suspension orders which, by their terms, are issued and become effective before a hearing can be held. Plaintiffs argue that if subsection (c)(2) bars judicial review, the second sentence of

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[3] Section 6(c)(4), 7 U.S.C.A. § 136d(c)(4), provides in relevant part:

> A final order on the question of suspension following a hearing shall be reviewable in accordance with section 136n of this title, notwithstanding the fact that any related cancellation proceedings have not been completed. Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court, solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law.

subsection (c)(4) becomes a surplusage.

[5] A. We find the district court's asserted ground for jurisdiction unpersuasive. While it is true that some of the registrants sought a hearing, they subsequently withdrew their requests. It is quite obvious that the provision barring judicial review where no hearing is requested applies with equal force where a hearing is first requested and the request is then withdrawn. In either case, the registrants--those persons most directly affected by the suspension order--have waived their right to administrative remedies in the form of review by an administrative law judge. There is no less a waiver when the registrant first asks for a hearing and then changes his mind than when he asks for no hearing in the first place. *See Nagel v. Thomas*, 666 F.Supp. 1002, 1006-07 (W.D. Mich. 1987) (dinoseb registrants' request for hearing and later withdrawal thereof is the functional equivalent of no request).

B. This leaves the question whether judicial review of an emergency suspension is barred when no registrant timely requests a hearing. As is often the case where Congress drafts complex statutes, the various provisions do not fit with surgical precision. While the statute's meaning may be clear as to most of the situations it

covers, cases may arise where two provisions in the same statute, or in different statutes, apparently conflict. It is then up to the courts to make sense of these apparent inconsistencies.

[6] This is such a case. On the one hand, Congress provided for immediate judicial review of emergency suspension orders. FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4). On the other, it provided in the most categorical terms that judicial review of suspension orders is precluded where the registrant waives its rights to an administrative hearing. FIFRA § 6(c)(2), 7 U.S.C.A. § 136d(c)(2). The conflict is exacerbated somewhat by the fact that judicial review of an emergency suspension order may be sought by any "interested person" with the concurrence of a registrant, while administrative review may be requested only by the registrant itself. If possible, we must give these apparently conflicting provisions a sensible reading that avoids redundancy or surplusage.

We find such a construction possible. FIFRA § 6(c)(4) authorizes the district courts to review EPA orders entered "prior to a hearing." This phrase potentially embraces two categories of suspension orders: ordinary orders issued after registrants waive a hearing,

and emergency orders issued before an opportunity therefor. Since ordinary orders entered after waiver of a hearing are made unreviewable under subsection (c)(2), subsection (c)(4) must authorize district courts to review emergency suspension orders, if it is to have any meaning at all.

The EPA does not seriously dispute this construction. It argues, however, that the district court may review emergency suspension orders under subsection (c)(4) only so long as they are in fact emergency suspension orders, that is, pending an opportunity for an agency hearing. If a hearing is held, the EPA's argument continues, the final suspension order is reviewable in the court of appeals.[4] If, on the other hand, a hearing is waived (as was the case here), the final suspension order is entered by operation of law and, under subsection (c)(2), is not reviewable.

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[4] *See* FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4) ("[a] final order on the question of suspension following a hearing shall be reviewable in accordance with section 136n of this title"); FIFRA § 6(e), 7 U.S.C.A. § 136d(f) ("[f]inal orders of the Administrator under this section shall be subject to judicial review pursuant to section 136n of this title"); FIFRA § 16(b), 7 U.S.C.A. § 136n(b) (providing for court of appeals review of "any order issued by the Administrator following a public hearing").

FIFRA, however, provides for the issuance of a final suspension order only in those cases where there is an administrative hearing. There is no provision for entering a separate final suspension order if no hearing is held after issuance of an emergency order, and none in fact was entered in this case.[15] The EPA invites us to create a procedural fiction to the effect that a final suspension order follows an emergency order whenever a hearing is waived. We see no reason for doing so. As we read the statute, when no hearing is held, the emergency suspension order simply stays in effect until the cancellation or classification proceedings are completed, or, as in this case, until stayed by the district court.

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[15] The Department of Justice described the EPA's suspension procedure in this case in a letter to the court:

> There is no separate order that constitutes a "final suspension". Rather, as recited in the October 7 Emergency Suspension Order, see 51 Fed. Reg. at 36648, the failure to request an expedited hearing on the order means that the suspension becomes final, **by operation of law**. Since the requests that had been made were withdrawn . . ., the order automatically became final on October 30, 1986. Letter from Peter R. Steenland, Jr. to Betty Parshall (Aug. 7, 1987) (emphasis original).

[7] The EPA also argues that subsection (c)(3), which provides for the issuance of emergency suspension orders, by its terms incorporates subsection (c)(2), including the provision prohibiting judicial review where no registrant requests a hearing. However, the language of subsection (c)(2) indicates that this prohibition against judicial review applies only to those situations where the agency has given notice of its intent to issue a *non-emergency* suspension order: "If no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), *the suspension order may be issued and shall take effect* and shall not be reviewable by a court." FIFRA § 6(c)(2), 7 U.S.C.A. § 136d(c)(2) (emphasis added). In the emergency case, the suspension order has already issued and taken effect before any notice to the registrants and opportunity for a hearing. This first sentence of subsection (c)(2), unlike the other provisions of that subsection which concern hearing procedures, simply does not make sense in the emergency context and must therefore be limited to ordinary suspension orders issued after notice. *Contra Nagel*, 666 F. Supp. at 1007-08 (finding no jurisdiction to hear Michigan gladiolus growers' challenge to dinoseb suspension order).

The EPA's argument that the district courts' jurisdiction expires with waiver of a hearing also does not fully comport with the language or drafting history of the provision. Subsection (c)(4) authorizes the district court to enter a stay of the order "pending the Administrator's final decision with respect to cancellation or change in classification." FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4). Had Congress meant for the district court to act only until administrative review was waived or concluded, the statute would have so provided. In fact, the Senate Agriculture and Forestry Committee reported out a bill providing precisely that: "The effect of any order of the court will be only to stay the effectiveness of the suspension order, pending hearing before the Administrator." S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4068. That provision was amended to the current form by the conference committee. *See* Conf. Rep. No. 1540, *reprinted in* 1972 U.S. Code Cong. & Admin. News 4130, 4132-33. That Congress gave the district court authority to stay suspension orders long after any administrative hearing on suspension, up to the time when the EPA has ruled on the cancellation or reclassification, strongly suggests that the district court's jurisdiction is not limited

in the fashion suggested by the EPA.

We see one final anomaly in the EPA's position, albeit a minor one. Subsection (c)(4) provides that the district court action "*may* be maintained simultaneously with any administrative review proceeding under this section" (emphasis added). As the EPA would have us interpret the statute, judicial review could *only* be maintained simultaneously with administrative review because if no administrative review is sought, under the EPA's view, the right to judicial review would be cut off. We decline to change the statutory "may" to a "must."

[8] We recognize that this issue is far from clear-cut. The EPA's position is not implausible and, quite frankly, neither side advances an entirely satisfactory construction of a statute that obviously was the product of some controversy and considerable compromise. The courts have long recognized, however, a presumption in favor of judicial review of administrative actions. *See Block v. Community Nutrition Inst.*, 467 U.S. 340, 350-51, 104 S. Ct. 2450, 2456, 81 L.Ed.2d 270 (1984) (presumption only overcome when "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme'"); *Ruff v. Hodel*, 770 F.2d 839, 840 (9th Cir. 1985) ("[t]he bar to judicial review . . . requires a 'persuasive

reason to believe' that Congress intended to preclude judicial review") (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967)); *Moapa Band of Paiute Indians v. Department of Interior*, 747 F.2d 563, 565 (9th Cir. 1984) ("[p]reclusion of judicial review is not lightly inferred, and usually will not be found absent a clear command of the statute"). Moreover, we construe prohibitions against judicial review narrowly. *Cf. Wallace v. Christensen*, 802 F.2d 1539 (9th Cir. 1986) (en banc); *Moapa Band*, 747 F.2d at 565. In light of these considerations, we find plaintiffs' interpretation the most plausible, and hold that the district court had jurisdiction to review the EPA's suspension order.

II.

Subsection (c)(4) provides that an emergency suspension order shall be reviewable by the district court "solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with procedures established by law." We review the district court's legal determinations de novo and its factual findings for clear error. *United States v. McConney*, 728 F.2d 1195, 1200-01 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct.

101, 83 L.Ed.2d 46 (1984). On the question whether an injunction was properly issued, once the facts and law are established, we review for abuse of discretion. *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir. 1985).

[9] A. As a preliminary matter, the EPA argues that the district court improperly considered evidence beyond the four corners of the administrative record. Generally, judicial review of agency action is limited to review of the record on which the administrative decision was based. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973), *quoted in Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743, 105 S.Ct. 1598, 1606, 84 L.Ed.2d 643 (1985); *Friends of the Earth v. Hintz*, 800 F.2d 822, 828-29 (9th Cir. 1986).

[10] We have recognized, however, certain exceptions to this general rule. The court may find it necessary to review additional material to explain the basis of the agency's action and the factors the agency considered.

Friends of the Earth, 800 F.2d at 829; *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159-60 (9th Cir. 1980). Moreover, the court may consider, particularly in highly technical areas, substantive evidence going to the merits of the agency's action where such evidence is necessary as background to determine the sufficiency of the agency's consideration. *Asarco*, 616 F.2d at 1160. Nonetheless, the court may not weigh the evidence to determine the correctness or wisdom of the agency's decision. *Id.* at 1160-61.

[11] The statutory scheme here strongly suggests that this is an appropriate case for consideration of matters outside of the administrative record. Subsection (c)(4) carefully apportions jurisdiction to review the EPA's suspension order between the courts of appeals and the district courts: "final order[s] on the question of suspension following a hearing shall be reviewable in accordance with section 136n [in the courts of appeals]." By contrast, emergency suspension orders, issued without the benefit of an agency hearing, are to be reviewed by the district courts. A fair implication is that, where no administrative hearing has been held, the district court--a court of first instance equipped to consider evidence--may look to matters outside the

administrative record. Otherwise, it would have made little sense for Congress to give the district courts jurisdiction to review emergency orders; it might as well have left all agency review in the courts of appeals. *See* S. Rep. 970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4092, 4113 (bill vests jurisdiction over emergency orders in the district courts because, in the absence of an administrative hearing, there would be no factual record for an appellate court to review).

We therefore conclude that the district court was well within its authority in considering evidence outside the administrative record. The evidence it considered was precisely of the type that it could properly take into account in determining whether the agency acted arbitrarily or in a manner inconsistent with the statute. Moreover, the district judge carefully limited the scope of the inquiry, noting that, "[i]n considering the evidence presented outside the administrative record, I did not question the scientific merit of the EPA's decision . . .. Instead, I was concerned that the EPA had not considered all relevant factors . . .." Dist. Ct. op., 668 F. Supp. at 1448.

First, the court heard testimony from two EPA

officials: Dr. James Lamb, Special Assistant to Assistant Administrator for Pesticides and Toxic Substances; and Roger Holtorf, an economist with the Economics Analysis Branch of the Benefits and Use Division of the Office of Pesticides Programs. Holtorf, the principal EPA witness, was a team leader for the dinoseb cancellation proceedings and was involved in providing information on the economic consequences of dinoseb for the suspension hearing. 2 RT at 188, 190. The district court first carefully determined that Holtorf was intimately familiar with the evaluation process carried out by the EPA. *Id.* at 192-93. Holtorf then testified about the information considered by the EPA on the effects of suspension and the extent of its investigation and evaluation of these effects on plaintiffs' crops. In the district court's judgment, such evidence was necessary in light of plaintiffs' contention that the EPA's fact-finding procedures were inadequate. This testimony was properly admitted as evidence necessary to explain the basis for the agency action. *See Asarco*, 616 F.2d at 1159-60.

Second, the district court considered evidence developed or brought to the attention of the EPA after the issuance of the suspension order, evidence pertaining

to the relative efficacy of alternative pesticides in the Pacific Northwest and potential costs of the suspension. Much of this evidence was developed during plaintiffs' subpart D proceeding or in the course of the EPA's reconsideration as to other crops. *See* p. 1351 n. 7 *supra*. The court reviewed the evidence not in order to judge whether the EPA properly weighed the costs and benefits, but only to determine whether it considered them at all. So limited, the court's consideration of evidence was entirely proper. *See Asarco*, 616 F.2d at 1160. We turn therefore to the merits of the district court's decision.

[12, 13] B. The EPA may only issue a suspension order if it determines that continued use of the pesticide during cancellation proceedings would pose an "imminent hazard." The statute defines that term as a situation where continued use "would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard to the survival of a species declared endangered or threatened . . .." FIFRA § 2(l) (amended 1973), 7 U.S.C.A. § 136(l). In turn, "unreasonable adverse effects on the environment" means "any unreasonable risk to man or the environment, taking into account *the economic, social, and environmental*

costs and benefits of the use of any pesticide." FIFRA § 2(bb), 7 U.S.C.A. § 136(bb) (emphasis added). Before suspending all dinoseb registrations, the statute thus requires the EPA to consider the benefits as well as the risks of its use, including the economic consequences of suspension.[11]

The EPA admitted in its October 14, 1986, Notice of Intent, that "[f]or some . . . sites, such as green peas, snap beans, caneberries, and hops, the extent of economic impacts is uncertain." 51 Fed. Reg. at 36656. Based on this admission and other evidence, the district court found that "[b]ecause of the way in which the EP gathered information, the impact of a ban on dinoseb on the northwest was treated in a cursory, unacceptable fashion." Dist. Ct. op., 668 F.Supp. at 1449. While concluding that dinoseb's potential dangers were properly substantiated, *id.* at 1448, the district court held

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[11] As the court held in *Dow Chem. Co. v. Blum*, 469 F.Supp. 892, 902 (E.D. Mich. 1979), the EPA should examine: "(1) The seriousness of the threatened harm; (2) The immediacy of the threatened harm; (3) The probability that the threatened harm would result; (4) Benefits to the public of the continued use of the pesticides in question during the suspension process; and (5) The nature and extent of the information before the Administrator at the time he made his decision."

that "the EPA did not consider all relevant factors and, hence, made a clear error of judgment resulting in [a] finding that their entry of the emergency suspension order was arbitrary and capricious." *Id.* at 1448-49.

After a careful review of the administrative record and the supplemental testimony before the district court, we must agree. The EPA's evaluation of the relevant factors under FIFRA was incomplete and rushed and, under the circumstances of this case, simply not adequate to justify the emergency suspension of plaintiffs' use of dinoseb.

First, the EPA gave itself insufficient time to comply with the statutory requirement that it balance risks and benefits. The EPA became especially concerned about the hazards of dinoseb in late June of 1986 when it received two studies from registrants indicating environmental risks. 1 RT at 144-45, 147. Around August 1, 1986, it ordered its Benefits and Use Division to prepare an evaluation of dinoseb, including production and usage information, a biological assessment and an economic impact assessment. 2 RT at 190, 193, 214. It established a September 1 deadline, which left what EPA economist Holtorf characterized as "a very short time frame." *Id.* at 190-91. The division was given only two

weeks within which to evaluate nearly one hundred registered "sites," or crops, listed on dinoseb labels. 1 RT at 126; 2 RT at 197. As Holtorf testified, "roughly a couple of weeks is about all total that we had to evaluate this; and the staff available for evaluation, they were fully employed with other projects." 2 RT at 207.

Given this tight schedule, the EPA personnel responsible for evaluating the benefits of dinoseb never quite got around to studying plaintiffs' crops. The agency's standard methodology called for the staff to rank the various sites either by total acreage treated or by total pounds of dinoseb applied. With the information at hand, the EPA staff identified roughly 15 sites. 2 RT at 197. Starting with the largest crops, soybeans, peanuts and potatoes, the staff was supposed to work its way down the list until no other usages could be identified. *Id.* at 197, 206. However, by the sixth and seventh sites, green peas and snap beans (each of which accounted for approximately 2 percent of total dinoseb usage in the United States, *id.* at 197), the EPA had to stop because it ran out of staff and resources. As economist Holtorf testified, "we flat ran out of resources when we got about halfway down the list which would be roughly peas and beans . . .. We have a relatively

small staff in relation to our work load, Your Honor. The Federal has been somewhat on a slide in terms of resources over the last few years." 2 RT at 206-07. The EPA thus never reached caneberries and cucurbits, which ranked below green peas and snap beans.

As a result of the incomplete study process, the district court found, the EPA used "scanty" data with respect to those crops, information "inconsistent with or contradicted by data readily available to, but not considered by, the EPA." Dist. Ct. op. at 1449. For example, a principal document in the administrative record, relied upon by the decision-makers, was a study titled "Dinoseb: Summary of Biological and Economic Impacts of a Suspension/Cancellation." (EPA Aug. 1986) (Plaintiffs' Exh. 1) [hereinafter August Summary]; *see* Dist. Ct. op., 668 F.Supp. at 1449. That document, dated August 1986 but attached to a cover memorandum dated September 2, 1986, was unfortunately both flawed and incomplete.[11] It was only a less detailed version of a May

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[11] For instance, it listed paraquat as an alternative for dinoseb as a desiccant on caneberries. But paraquat is not registered for "cane burning" and therefore may not be so applied. Letter from Mike Schwisow, State of Washington Department of Agriculture, to Donald R. Stubbs, EPA, at 2 (continued...)

1986 document that, by its own description, was "limited in scope . . . and should not be considered as a benefit analysis." Dinoseb: A Summary of Biological and Economic Effects 4 (EPA May 1986) (Plaintiffs' Exh. 62) [hereinafter May Summary]; *see* Dist. Ct. op. at 1449. Although Holtorf testified that "there were telephone calls made to individuals at various Land Grant universities," he also stated that "[f]rom the time of the emergency suspension activity began until the document was prepared, there was no opportunity to gather additional outside information . . .." 1 RT at 124." The

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(...continued)
(March 11, 1987) (Plaintiffs' Exh. 43); 1 RT at 118, 132; *see* p. 1361 *infra*.

" The EPA relied heavily on its own limited information. For example, it sought no information on alternative pesticides for green peas and snap beans from the public, 1 RT 124, 126; 2 RT at 205-06, but made some telephone calls and used some published usage reports and EPA-approved labeling information. 2 RT at 204-05. The chief of the Economic Analysis Branch of the Benefits Division summarized the extent of the EPA investigation in a memorandum to the chief of the Special Review Branch of the Registration Division:

> In the case of dinoseb suspension/cancellation, the analysis was conducted by EPA staff personnel.

(continued...)

district court found the "[t]he September document was not updated." Dist. Ct. op. at 1450.

The paucity of the information in the possession of the EPA when it summarily suspended use of dinoseb in the Northwest is disturbingly revealed by this document. The report states at the outset that, although the Benefits Division usually considers information from "all possible data sources" during cancellation proceedings,

> due to the sensitive nature of suspension proceedings, outside resources were not used to estimate the current biological and economic impacts for either a suspension or a cancellation of dinoseb. While this impact analysis is the best that can be provided with current data limitations, it is possible that the impacts could change with new information from outside

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"(...continued)
In other words, no analyses and significant data gathering activities were conducted by EPA cooperators, contractors, or other parties. The analysis was done on a quick turn-around basis based upon readily available data and information within the Agency.

Memorandum from Dr. Arnold L. Aspelin to Janet Auerbach at 1 (Sept. 29, 1986) (Plaintiffs' Exh. 65).

sources.

August Summary at 1-2." The summary's findings are woefully incomplete. They note, for example, that "[w]ith other crops, such as caneberries and hops, there is uncertainty as to the extent of impacts because of substantial data gaps." *Id.* at 10. They go on to state that "[t]he overall impacts from a loss of dinoseb on green peas and snap beans are not as well defined [as those for potatoes and peanuts] . . .. Based on indications that the dinoseb alternatives may not be as effective, output losses are possible *but could not be accurately assessed with available data.*" *Id.* at 11-12 (emphasis added). The tables provided in the summary reveal starkly the EPA's uncertainty as to the economic impact of suspension on the crops grown by plaintiffs.[*]

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[*] The document does not disclose what it is about the proceedings that made them so sensitive that no outside parties could be consulted.

[*] Table 2 shows the "Significance of Economic Impacts" for the various sites. For snap beans the grower impact is listed as "minor," the consumer impact "uncertain." For green peas, the consumer impact is similarly "uncertain," but the grower impact conclusion of "minor" is footnoted with the following: "Grower impact expected to be $1.2M annually based on a change in treatment costs. Yield

(continued...)

In addition to limited date, the EPA conducted only a cursory evaluation of the availability of alternative pesticides and the consequent economic impact of suspension; it gave no particular attention to the Northwest at all.[z] Even though consideration of the

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[z](...continued)
losses may occur if alternatives are less effective in controlling black nightshade, however the extent is unknown." For berries, the consumer impact is once again "uncertain," and the grower impact is "minor," footnoted with the following: "Increase in treatment costs are expected to be approximately $78,000 annually. The significance of the economic impact could not be accurately assessed with available data." There is no specific listing for cucurbits.

In table 3, which sets forth the "Summary of Biological and Economic Impacts of Suspension/Cancellation of Dinoseb, by Site," the yield effect for snap beans is listed as "Unknown," the consumer effect "Uncertain." For green peas, the yield effects are "Possible; extent unknown," and the consumer price effect is "Possible; expected to be > 1%," despite ignorance of expected losses. For caneberries, the yield effects and consumer price impact are respectively "Unknown" and "Uncertain." Once again, there is no specific listing for cucurbits.

[a] For Example, the district court found as follows:

> [T]he record shows that telephone calls were made to knowledgeable people in the northwest, but no
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> (continued...)

comparative performance of the challenged pesticide and its alternatives is a standard part of the EPA's benefit analysis, 2 RT at 227, the May summary study stated that there had been no such analysis of dinoseb and its alternatives, and that as a result the authors could not estimate yield or revenue effects. May Summary at 7; 2 RT at 220.

Holtorf testified that the EPA never completed a "full efficacy evaluation" for peas and beans. 2 RT at 206. At the time of the suspension, the EPA was thus "very uncertain as to the levels of these alternatives" for dinoseb and "because of the uncertainties, [the EPA staff was] a little reluctant to estimate exact yield losses that could result." *Id.* at 207; *see also* 1 RT at 131-32. The EPA

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[2](...continued)
record of what was discovered by those calls was made.

> A minimal investigation would have revealed that the alternative sprays proposed were not viable alternatives in the northwest, although they were viable in other ares of the country where soil and other conditions differ. Defendant had no rebuttal to the conclusions of experts who testified that no viable alternative chemical sprays exist presently.

Dist. Ct. op., 558 F. Supp. at 1450.

also had no evidence of what effect dinoseb suspension would have on caneberries and made no effort to find any. 1 RT at 133. As a result, although it had studied potatoes and peanuts in greater depth, the EPA was not able to evaluate the economic effects of dinoseb suspension on growers, regionally or nationally, "for some of the lesser used sites," including green peas and snap beans. 2 RT at 210.

In its own defense, the EPA argues that it ordered suspension on a nationwide basis, and was entitled to rely on nationwide findings as to alternatives and economic impact. For example, it found that only about a third of the nation's green pea acreage and 20 percent of the snap bean acreage was treated with dinoseb. 2 RT at 198-99, 201. It therefore extrapolated the costs of suspension likely to be suffered by pea and bean farmers in such states as Wisconsin to all parts of the country and concluded there "would be a minor effect on a national basis." 2 RT at 208 (green peas); *id.* at 209, 241 (snap beans). However, as the district court pointed out, there was no pressing need to enter an immediate nationwide ban on dinoseb: "The agency did have the power to suspend registration on a crop by crop and/or area by area basis." Dist.Ct. op. at 1449. The suspension

order was entered in October while the spraying season for the crops here at issue was not until the following March or April, some six months later. *See* Dinoseb: A Summary of Biological and Economic Impacts of an Emergency Suspension, table 1 (EPA Aug. 1986) (Plaintiffs' Exh. 63). The EPA therefore had ample time to give the Northwest Crops separate and careful attention.

There were good reasons for the EPA to have done so. At the time it entered the order suspending dinoseb nationally, the EPA was aware that the Pacific Northwest was subject to unusual conditions that made reliance on national figures tenuous, if not completely arbitrary. 2 RT at 209-10. For example, Northwest green pea farmers have to contend with black nightshade, a weed that produces a toxic berry about the same size as a pea. 1 RT at 43. The agency was aware that dinoseb was the only pesticide effective against nightshade. *See, e.g.*, Notice of Intent, 51 Fed. Reg. at 36657 ("[m]ost of the alternatives provide poor control of black nightshade"); May Summary at 7-8 & table 2; 2 RT at 220-21, 223. Without dinoseb, farmers would be unable to keep nightshade out of the pea harvest, and processors would reject the crops infested with the toxic berries. *See, e.g.*,

Letter from W.H. Kosesan, Oregon Department of Agriculture, to Donald R. Stubbs, EPA, at 2 (Feb. 13, 1987) (Plaintiffs' Exh. 36); 1 RT at 14-15, 26, 43-44, 81-82; *see also* May Summary, table 2 ("[m]arginal producers with serious broadleaf e.g. nightshade, infestations may be forced out in a few years"). Although the EPA knew that nightshade posed some problem, it did not follow up on this issue, nor did it specifically evaluate the impact of suspension on the Northwest region. 1 RT at 131-32, 154; 2 RT at 209, 221-22.[2]

By extrapolating data from other regions, the EPA also did not consider, as it should have, the particular economic circumstances of farmers in the Pacific Northwest. For example, 95 percent of the commercial

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[2] Holtorf testified to the EPA's disregard for the particular problems of Northwest farmers:

> There was certain information and indications in the information that nightshade was a problem here; we so noted that problem. We recognized that as we typically do as to all pesticides that, as to certain areas of the country is more affected by [sic] others. But when you make a decision on a national basis--and that how the decision was made, on a national basis and not on a local basis.

2 RT at 208.

raspberry crop is grown in that region, and dinoseb is the only herbicide known to be effective as a chemical pruning agent in suppressing the primocane stage of raspberry growth; this "cane burning" increases crop yield and permits mechanical harvesting. Kosesan Letter at 3-4; Schwisow Letter (Plaintiffs' Exh. 43) at 4 (raspberry yield increases of 45 to 90 percent); 1 RT at 50-51, 116-17. The industry faces strong competition from Canadian producers across the Washington border, where dinoseb use is permitted. Without dinoseb, the entire American raspberry crop might prove unprofitable. *See* Schwisow Letter (Plaintiffs' Exh. 43) at 4; 1 RT at 90-91.

In addition, specific crop effects, such as the loss of various caneberries and the contamination of green peas by black nightshade, could have tremendous secondary effects in the Northwest, none of which the EPA considered. As the district court found, "[c]rop losses of this magnitude will result in business failures not only for farmers, but for the food processing industry as well." Dist. Ct. op. at 1451. These losses were not included in the $39.2 million estimate, which covered only the losses to growers. *Id.* Plaintiffs presented testimony that food processors and other buyers come to the Northwest for

the pea and bean crops, and then purchase a fuller line of vegetables while there. 1 RT at 86-87. Should the caneberry, pea or bean crops fail or prove unmarketable because of the suspension, the effects might ripple throughout the Northwest agricultural sector: Buyers would establish sources of supply elsewhere; processors might find it unprofitable to maintain plants in the region without those key crops; producers of other, ancillary, crops may be unable to sell their harvests as well. *See* Dist. Ct. op. at 1451. The effect of crop losses growing from discontinued use of dinoseb thus could seriously harm the entire regional economy.[2] Without any investigation of those economic effects, however, the EPA could not do even a rough and ready balancing.

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[2] For example, the Washington State Department of Agriculture informed the EPA that "snap beans (along with other vegetable crops) is not an economically healthy industry and cannot afford another economic stress. The industry is dependent on dinoseb, and research efforts to find alternatives have not been permitted adequate time." Letter form Mike Schwisow to Donald R. Stubbs at 3 (March 11, 1987) (Plaintiffs' Exh. 41). *See also* Letter from Schwisow to Stubbs at 3 (March 11, 1987) (Plaintiffs' Exh. 42) ("[t]he Washington cucumber industry is not highly profitable, and the loss of dinoseb without some time to develop substitutes is a catastrophic blow to it"); *see generally* 1 RT at 86-87, 92-93; 2 RT at 257-62.

It may well be that, despite these dire economic effects, the suspension would be justified by the health risks to applicators and other farmworkers.[4]

C. The EPA claims that the health risks were equivalent for all crops, and that the need to act decisively in removing dangerous pesticides from use justifies its less than exhaustive inquiry at the emergency suspension stage. *See Environmental Defense Fund, Inc. v. EPA*, 465 F.2d 528, 537 (D.C.Cir.1972) (expedited hearing on imminent hazard "is to make a preliminary assessment of evidence, and probabilities, not an ultimate resolution of difficult issues"). Complete review of all uses, it claims, is the proper function of the full cancellation proceedings. *See Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292, 1303 (D.C.Cir.1975) ("[a] more careful exploration of the availability of alternatives for minor

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[4] In this regard we note, as did the district court, that "when the EPA obtained more information in hearings held in March, 1987, it modified the [suspension] order to allow the application of dinoseb to dry peas and lentils. There is no reasonable explanation why the crops at issue are treated differently. The application of dinoseb is frequently done by the same individuals and the risks affecting them are the same no matter what crops are being treated." Dist. Ct. op., 668 at 1450; *see, e.g.*, 1 RT at 13-14.

uses would be contemplated for the final determination on cancellation *vel non*"). Because the Pacific Northwest sites represented a relatively small percentage of dinoseb use nationally, the EPA contends that it was not required to prepare a full evaluation of economic consequences.

With all due respect to the EPA and its overworked staff, such insensitivity to the local economic problems caused by its decision is unbecoming and inappropriate. Crop losses of over $39 million may look like small potatoes from Washington, D.C., but, as the district court found, such losses would cause very serious economic hardships to the people of the Northwest who should have to bear them. There may well be very minor uses that are of economically trivial importance and therefore need not be separately studied before a suspension order is entered. *See, e.g., Environmental Defense Fund*, 510 F.2d at 1303 (challenged pesticide "is used on less than 5 percent of the total citrus acreage, and the ALJ noted that much of that use was a kind of 'just in case' insurance, applied even in the absence of knowledge that the pest exists in the pertinent grove"). The effects in the Northwest documented here surely do not fall into that category. As the district court noted:

> [S]everal processing plants are the principal payroll in small Washington and Oregon

> communities . . .. If these processing plants cease to operate because of business losses, community stability will be profoundly and adversely affected. The State of Oregon anticipates and proved a potential and severe impact on its economy if these losses disrupt the agricultural industry to the extent predicted.

Dist.Ct. op., 668 F.Supp. at 1451. There is ample support in the record for the district court's conclusion. *See* pp. 1360-1361 *supra*.

The EPA's inattention to the Northwest's special problems might nevertheless have been justified if there had been a genuine emergency that necessitated an immediate suspension of all dinoseb uses and foreclosed consideration of the problems faced by different regions of the country. However, the record does not document any particularly compelling circumstances requiring the EPA's haste. In order to issue a suspension order without notice and prior opportunity for a hearing, the EPA must first find that there is an emergency that justifies immediate suspension. FIFRA § 6(c)(3), 7 U.S.C.A. § 136d(c)(3). The district court found that the principal basis for the "emergency" was the spraying of the potato crop in the early fall of 1986. *See* Dist. Ct. op.

at 1449.[4] By the time the EPA published the suspension order on October 14, 1986, however, the potato crop had already been treated with dinoseb.[5] Moreover, as noted, dinoseb use need not have been banned on a nationwide basis. *See id.* The EPA had another six months--until March or early April 1987--to study the situation of the Pacific Northwest. In the absence of an ongoing health hazard to create an emergency, giving the Benefits Division insufficient time and resources to evaluate the various crops appears to have been entirely arbitrary.

The Administrator estimated that it would take four months to complete a suspension hearing; Holtorf testified that the economic impact evaluation and

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[4] *See also* Summary of Economic Impacts, Plaintiffs' Exh. 1, at 12 ("[t]he overall impacts of an Emergency Suspension would primarily be borne by potato growers"); Memorandum from Arnold L. Aspelin, Chief, Economic Analysis Branch, Benefits and Use Division, to Janet Auerbach, Chief, Special Review Branch, at 1 (Sept. 12, 1986) (plaintiff's' Exh. 64) ("[t]he emergency suspension will have the greatest impact on potato growers who are yet to harvest later in the fall").

[5] *See* Dist. Ct. op., 668 F.Supp. at 1449; 2 RT at 229, 234; Aspelin Memorandum, Plaintiffs' Exh. 64, at 1 ("[w]e understand that most dinoseb usage for potato desiccation would be completed by October 1 or soon thereafter if there were no suspension").

comparative performance review for the remaining crops would have been performed between September 1986 and March 1987. 2 RT at 235; *see also* 1 RT at 156 (Lamb testimony). The EPA, however, neither used that time to compile evidence justifying an emergency order, nor took advantage of the winter hiatus in dinoseb application to hold a suspension hearing. By suspending first and asking questions later--if at all--the EPA acted without due regard to the commands of FIFRA. We therefore agree with the district court that the emergency suspension order was arbitrary and capricious, an abuse of discretion, and was not issued in accordance with the provisions of FIFRA.

Our conclusion in this regard is based on the circumstances of this case. Our holding should not be interpreted as suggesting that where human health is imminently threatened, the EPA may not lawfully issue an emergency suspension before considering the economic circumstances of every affected region. In this case, however, at the time the EPA entered its order, the agency had already received substantial information regarding a potentially disastrous and unique economic impact of its contemplated action on one affected geographic area. It issued the emergency suspension

order without evaluating that impact, and then failed to use available time after entry of the order and before advent of the spring use season to evaluate the risks and benefits in the Pacific Northwest. Under those circumstances, the EPA acted arbitrarily and capriciously.

III.

[14] Having found the EPA's suspension order to be arbitrary, capricious and an abuse of discretion, we turn to the district court's grant of relief to plaintiffs. As noted above, the district court did not merely stay the suspension order. It handed down a five-page preliminary injunction permitting use of dinoseb on the crops at issue in Oregon, Washington and Idaho. The court specified the conditions for such use:

1. That dinoseb be sold (1) only to growers of green peas, snap beans, cucurbits, and caneberries in Oregon, Washington, and Idaho (2) in a quantity not to exceed that required to treat his acreage for each of those crops at the maximum application rates stated below. Dealers must maintain records of sales to growers.

2. Only certified applicators may use dinoseb; other persons, even if they are operating under the direct supervision of a certified applicator, may not use dinoseb.

3. Women of child-bearing age, i.e., under the age

of 45, may not be involved in mixing, loading, or any aspect of dinoseb application.

4. A warning label must appear on the product specifying that (1) women of childbearing age may not use the product, (2) all reasonable efforts should be made to minimize indirect exposures to women of child-bearing age, (3) the product also poses risks to male reproduction, (4) is acutely toxic, and (5) the product may be applied only by certified applicators.

5. Aerial spraying is prohibited.

6. Mixing/loading of dinoseb is prohibited except from closed systems.

7. Ground application of dinoseb is prohibited except by the 'barrel sucker'/ground boom/tractor system.

8. Mixer/loaders and applicators must wear chemically resistant disposable coveralls (Tyvek suits) and chemically resistant gloves when mixing or loading dinoseb. Applicators or other personnel may remove such protective clothing immediately before entering the tractor cab to avoid cab contamination, but must carry an unused set of gloves and coveralls in their cabs, to be used in the event of spraying equipment malfunction and repair during application.

9. That maximum application rates for dinoseb be

set as follows: 3 pounds ai/A for green peas, 4.5 pounds ai/a for snap beans, 4.5 pounds ai/a for cucurbits, and 2.5 pounds for caneberries.

10. That dinoseb be applied to a maximum of 80 acres per day per applicator.

Preliminary Injunction at 2-4. As to the spraying of green and dry peas, chickpeas, lentils, snap beans and cucurbits, the court added two "additional conditions":

11. Ground application is prohibited when wind conditions exceed ten miles per hour.

12. Tractor cabs must be closed and equipped with positive pressure ventilation systems.

Id. at 4. The court further specified that caneberries could only be sprayed during conditions that would "prevent any drift of the herbicide," and that "it may be applied by open tractors equipped as stated in paragraph 7 above, if operators wear chemically resistant disposable overalls of the type specified above." *Id.* Last, the court ordered Oregon to enforce these conditions, and applied the order to the two other states if they agreed to enforce the conditions. *Id.* at 4-5.

Such a detailed and carefully crafted order--balancing the rights and interests of the affected parties--would normally be entirely appropriate for a court sitting in

equity.[2] However, the court is not free to use its full powers of equity because FIFRA strictly limits the remedy the district court may provide if it deems the EPA's emergency suspension order improper: "The effect of any order of the court *will be only to stay the effectiveness of the suspension order*, pending the Administrator's final decision with respect to cancellation or change in classification." FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4) (emphasis added). Under the plain language of the statute, the district court could either let the suspension order stand or stay its effectiveness. The court was not empowered to craft an alternative suspension order. That task was reserved for the EPA.

Because the court exercised its discretion under the mistaken impression that it could tailor an injunction so as to limit the pesticide's use, we cannot be sure that it would have been willing to allow the unrestricted use of dinoseb. We therefore vacate the district court's injunction and remand for a redetermination of whether

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[2] We note, however, that the intervenor unions have challenged the district court's order on equal protection grounds because it treats men and women differently. Because we disapprove the district court's order on statutory grounds, we need not consider this argument.

to stay the EPA's suspension order.

The EPA is not without recourse. If the district court does stay the suspension, and even if does not, the EPA may initiate an expedited suspension hearing in which plaintiffs and other interested parties may participate. Or, the EPA may itself modify its suspension order, much as it did with respect to dry peas and lentils, in response to the pending subpart D petition. The district court would, of course, take any such modification into account in deciding whether to issue the stay, or, once issued, in deciding whether to keep the stay in effect. *See* Fed. R. Civ. P. 60(b)(5)-(6); *Nicacio v. United States Immigration & Naturalization Serv.*, 797 F.2d 700, 706 (9th Cir.1985) ("a court which issues an injunction retains jurisdiction to modify the terms of the injunction if a change in circumstances so requires"); 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2961, at 558-600 (1973). Thus, while the district court may, under FIFRA, suspend the EPA's order until completion of cancellation proceedings, this does not necessarily mean that dinoseb will be freely usable in the Northwest during that entire period. We leave these matters for the court and parties to sort out on remand.

Conclusion

We affirm the district court's ruling that the EPA order was arbitrary and capricious. We vacate its order staying the suspension, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

WILLIAM A. NORRIS, Circuit Judge, dissenting:

Under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y, pesticides may not be distributed or sold unless they are registered with the Environmental Protection Agency (EPA). 7 U.S.C. § 136a(a). Section 6(b) authorizes the Administrator of the EPA to give notice of his intent to cancel the registration of a pesticide

> [i]f it appears . . . that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of [the] Act or when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment . . ..

7 U.S.C. § 136d(b).

In October 1986, the Administrator gave notice of his intent to cancel registration of products containing the

pesticide dinoseb. Section 6(b) gives any person adversely affected by the notice the right to request a hearing on the proposed cancellation. If no hearing is requested, the cancellation becomes final after 30 days. 7 U.S.C. § 136d(b). In this case, six registrants[1] requested hearings on the proposed cancellation of 37 of the nearly 300 federal registrations of products affected by the cancellation notice. As provided in section 6(b), all other dinoseb registrations (approximately 260) were automatically cancelled 30 days after the notice was received. If, upon completion of the cancellation proceedings (which could take up to two years), the Administrator renders a final order cancelling the 37 dinoseb registrations still in effect, the order will be subject to judicial review under section 16(b). 7 U.S.C. § 136n(b).

In addition to giving the cancellation notice, the Administrator issued an emergency order immediately suspending the registration of all dinoseb products. He is authorized to do so if he determines that "action is necessary to prevent an imminent hazard during the

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[1] A "registrant" is defined by the statute as "a person who has registered any pesticide pursuant to the provisions of [the] Act." 7 U.S.C. § 136(y).

time required for cancellation . . . proceedings . . .," 7 U.S.C. § 136d(c)(1), and "that an emergency exists that does not permit him to hold a hearing before suspending [the registration]," 7 U.S.C. § 136d(c)(3). The question presented by this appeal is whether the district court had jurisdiction to review that emergency suspension order. As I read the statute, judicial review of the emergency order is foreclosed because of the failure of any registrant to request an expedited hearing on the question whether an imminent hazard exists.[2] The majority, on the other hand, holds that even in the absence of a request for an expedited hearing by a registrant, the district court had jurisdiction to review the order seven months after it became final under the statutory scheme. See maj. op. at 1355.

The statute authorizes the Administrator to issue either an ordinary suspension order or an emergency suspension order if he determines that action is necessary

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[2] Four registrants made timely requests for a hearing but later withdrew the requests. I agree with the majority that the withdrawal of the requests rendered them ineffective for statutory purposes: "It is quite obvious that the provision barring judicial review where no hearing is requested applies with equal force where a hearing is first requested and the request is then withdrawn." Maj. op. at 1354, *supra*.

to prevent "an imminent hazard during the time required for cancellation." 7 U.S.C. § 136d(c)(1). The critical distinction is that an emergency suspension order goes into effect immediately, whereas an ordinary suspension order cannot go into effect until after an expedited hearing on the question of "imminent hazard," provided such a hearing is requested within five days after the Administrator gives notice of his intent to suspend a registration. 7 U.S.C. § 136d(c). If an expedited hearing is not requested, an ordinary suspension order becomes final under section 6(c)(2): "If no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), the suspension order may be issued and shall take effect and shall not be reviewable by a court." 7 U.S.C. § 136d(c)(2).

Section 6(c)(2) is explicitly made applicable to emergency suspension orders by section 6(c)(3). 7 U.S.C. § 136d(c)(3). Section 6(c)(3) states that when an emergency suspension order is issued, "paragraph (2) shall apply" subject to two exceptions which are not relevant to the question of whether an emergency suspension order is judicially reviewable in the absence

of a timely request for an expedited hearing.' Thus on its face, section 6(c)(3), which authorizes emergency suspension orders, incorporates the language of section 6(c)(2) that a suspension order "shall not be reviewable by a court" if no request for an expedited hearing is submitted to the EPA within five days. 7 U.S.C. § 136d(c)(2). Thus, a suspension order, whether ordinary or emergency, is judicially reviewable *only if* a registrant makes a timely request for a hearing.' *Accord Nagel v. Thomas*, 666 F.Supp. 1002, 1006-07 (W.D. Mich. 1987).

The majority nonetheless holds that an emergency suspension order is judicially reviewable even in the absence of a timely request for an expedited hearing.

These exceptions are as follows:

> (i) the order of suspension shall be in effect pending the expeditious completion of the remedies provided by [paragraph 2] and the issuance of a final order on suspension, and (ii) no party other than the registrant and the Agency shall participate except that any person adversely affected may file briefs . . ..

7 U.S.C. § 136d(c)(3)

' A final order on suspension following an expedited hearing is subject to judicial review as provided by section 16(b). 7 U.S.C. § 136n(b).

The majority concedes that judicial review of an ordinary suspension order is foreclosed when no hearing is requested. *See* maj. op. at 1353, *supra*. But the majority gleans from the statute a distinction between ordinary and emergency suspension orders where none exists. As I understand the majority's analysis, the language of section 6(c)(3) that "paragraph (2) shall apply" in the case of an emergency suspension order was not intended by Congress to incorporate the first sentence of section 6(c)(2) which, to repeat, provides: "If no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), the suspension order may be issued and shall take effect and shall not be reviewable by a court." 7 U.S.C. § 136d(c)(2). The majority reasons that this sentence is not incorporated into section 6(c)(3) because "shall take effect" cannot apply to an emergency suspension order which is, by definition, already in effect. *See* maj. op. at 1352-1353. I find this to be a remarkably tortured and hypertechnical reading of the statute.

Congress made two explicit exceptions to the language in section 6(c)(3) which makes section 6(c)(2) applicable to emergency suspension orders. *See* 7 U.S.C.

§ 136d(c)(3)(i) and (ii). The majority effectively amends section 6(c)(3) to add a third exception as follows:

> [P]aragraph (2) shall apply except that (i) . . ., (ii) . . ., and (iii) the entire first sentence of paragraph (2) shall not apply.

The effect of this judicially created exception is that when the Administrator issues an emergency suspension order, the order *is* judicially reviewable even if no request for an expedited hearing is requested within five days. This added exception is particularly odd because the language of the first exception, section 6(c)(3)(i), clearly refers to a portion of the first sentence of section 6(c)(2) without writing the entire sentence out of section 6(c)(3).

Furthermore, the majority suggests no reason why Congress would make a distinction between the judicial reviewability of ordinary and emergency suspension orders. I suggest none exists. For our purposes, the only relevant difference between the two orders is that an emergency suspension order takes effect immediately. If no request for an expedited hearing is received within five days, a suspension order, whether ordinary or emergency, becomes final, suspending the registration of a pesticide until completion of cancellation proceedings. 7 U.S.C. § 136d(c)(2). Thus, in the absence of a request for an expedited hearing, the two types of orders become

functionally identical after five days. It simply defies common sense that an ordinary suspension order becomes final and unreviewable in the absence of a timely request for a hearing but an emergency order remains open and reviewable indefinitely. The majority reads into the statute congressional intent to authorize judicial review of the emergency suspension order seven months after it became final when an expedited hearing was not requested within five days. Yet the sole difference between an emergency suspension order and an ordinary suspension order in this case is simply this: Had the Administrator issued an ordinary suspension order rather than an emergency suspension order, the order would not have gone into effect immediately but would have gone into effect five days later.

The majority's reliance on the language of section 6(c)(4)[1] is to no avail. There is only one plausible reading

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[1] Section 6(c)(4) provides in part:

> Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court . . .. This action may be maintained simultaneously with

(continued...)

of section 6(c)(4): It provides that when an expedited hearing has been requested within five days, the registrant or an interested party (with the concurrence of a registrant) may seek judicial review of an emergency suspension order pending the outcome of an expedited hearing. Judicial review of an emergency suspension order is thus available under section 6(c)(4) only in the period of time after an expedited hearing has been requested but before the Administrator renders a final order on the issue of suspension, normally a matter of a few weeks.[*] *Accord Nagel*, 666 F. Supp. at 1007 (section 6(c)(4) "'was not intended to open the door to judicial review indefinitely merely because the registrant waived its opportunity for a hearing'"); *Dow Chemical Co. v. Blum*, 469 F. Supp. 892, 899 (E.D. Mich. 1979).

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[*](...continued)
any administrative review proceeding under this section . . ..

7 U.S.C. § 136d(c)(4).

[*] The EPA has five days after receipt of a request to commence an expedited hearing and must render a final order within 17 days following the conclusion of the hearing. The expedited hearing may be held at a later time only if the registrant and the EPA agree. *See* 7 U.S.C. § 136d(c)(2).

Although I agree with the majority that an "order of suspension entered prior to a hearing" can only refer to an emergency suspension order, this language in section 6(c)(4) cannot possibly mean that Congress intended to permit judicial review of an emergency suspension order when an expedited hearing has not been requested. *See* maj. op. at 1353, *supra*. There can be no such thing as an order pending an expedited hearing *unless* there has been a timely request for such a hearing within five days. In the absence of a timely request for an expedited hearing, the order becomes final, there is no expedited hearing, and the order is not "entered prior to a hearing." Thus an order can be an order "entered prior to a hearing" *only if* an expedited hearing is requested. Because an expedited hearing was never requested in this case, section 6(c)(4) simply does not apply. *Accord Nagel*, 666 F.Supp. at 1006-07; *Dow Chemical Co.*, 469 F.Supp. at 899 (judicial review of emergency suspension order under section 6(c)(4) prior to expedited hearing which had been requested by plaintiffs).

The bottom line in this case shows that the majority's reading of the statute is bizarre. Contrary to the clear intent of Congress, which has written a statute which speaks in terms of suspension orders becoming

final in *five days* if no registrant requests an expedited hearing, the majority allows non-registrants to seek judicial review of an emergency suspension order *seven months* after it became final by the terms of the statute. The district court clearly lacked jurisdiction to review the emergency suspension order.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOOD PROCESSORS ASSOCIATION, a non-profit association, JAMES M. LOVE, TUALATIN VALLEY FRUIT MARKETING, INC., an Oregon corporation, and AMERICAN FROZEN FOOD INSTITUTE, a non-profit association,	)	No. 88-641-RE
Plaintiffs,	)	OPINION
and	)	
DAVE FROHNMAYER, Attorney General for the State of Oregon, on behalf of the People of the State of Oregon,	)	
Intervenor,	)	
v.	)	
LEE M. THOMAS, Administrator, Environmental Protection Agency,	)	
Defendant.	)	

[Filed June 17, 1988]

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REDDEN, Judge

This case is related to the earlier action *Love v. Thomas*, 668 F. Supp. 1443 (D. Or. 1987), *aff'd in part, rev'd in part*, 838 F.2d 1059 (9th Cir. 1988). The background facts of this case are exhaustively discussed in *Love* and will not be repeated here. *Love* remains on appeal and I have no jurisdiction of that matter.

The instant case was filed on June 10, 1988 and seeks relief in the form of an injunction enjoining the enforcement of an order issued on June 9, 1988 by the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). That order cancels all registrations[1] of the

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[1] A pesticide product must be registered in accordance with the provisions of FIFRA before the product may be sold or distributed in interstate or intrastate commerce. The Administrator may issue a notice of intent to cancel an existing registration of a pesticide to prevent unreasonable adverse effects to humans or to the environment. A person adversely affected by the notice may request a formal (continued...)

chemical "dinoseb." Defendant has filed a motion in limine to limit the evidence before me to that of the administrative record. I deny this motion. At hearing, I granted intervention at the request of the State of Oregon.

In *Love*, I held, and the Ninth Circuit agreed, that the Administrator of the EPA (Administrator) had acted arbitrarily and capriciously, and had abused his discretion in ordering an emergency suspension of dinoseb 19 months ago. That emergency suspension order was issued pending a hearing on the question of whether registrations for the use of dinoseb should be cancelled.

The court of appeals affirmed in part but held that I

(...continued)
administrative hearing to contest the Agency's notice of intent to cancel. If a hearing is requested, any cancellation of the affected registration does not occur until the Administrator issues a final order. If the hearing request is withdrawn, cancellation occurs immediately by operation of law. Most of the dinoseb registrants chose to withdraw from the administrative proceedings during the course of the prior litigation and their registrations were automatically cancelled as a matter of law. On January 11, 1988, the remaining two registrants entered into the stipulation and settlement at issue here and agreed that they would not contest the entry of a final cancellation order for dinoseb in the form appended to the settlement agreement.

had exceeded my authority by spelling out in my injunction how dinoseb could be used on crops in Oregon, Washington, and Idaho. The matter was remanded for a redetermination of whether to stay the EPA's suspension order but that remand is now pending on defendant's petition for rehearing.

During the pendency of that appeal, the EPA has taken the actions which form the basis of this lawsuit. The EPA has entered into stipulation and settlement agreements with the two remaining registrants of dinoseb. In the agreements, these manufacturer/ registrants consent to the entry of a cancellation order by which "all registrations are cancelled for pesticide products containing dinoseb . . .." The order provides for the use of dinoseb on certain crops until existing stocks are depleted at which time usage of the pesticide will be prohibited. Use of existing stocks on certain other crops is not allowed under this order.

Plaintiffs challenge this "settlement" and contend that the Administrator has again failed to follow the statutory guidelines required by FIFRA, resulting in an unlawful cancellation of the dinoseb registration. Plaintiffs have moved for an injunction restraining the Administrator from enforcing his final order which cancels the use of

dinoseb on Northwest snap bean and cucurbit crops, as well as on pea crops after the 1988 growing season and on caneberry crops after the 1989 growing season.

Legal Standard for Preliminary Injunction

To obtain a preliminary injunction, plaintiff must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in their favor. *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). These are not separate tests, but are at the ends of the continuum; the greater the relative hardship to the moving party, the less probability of success must be shown. *National Center for Immigration Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984). Under any formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable injury. *Oakland Tribune*, 762 F.2d at 1376.

Jurisdiction

Defendant does not challenge the standing of these particular plaintiffs to bring this action. Defendant does contest jurisdiction, and contends that jurisdiction is properly with the court of appeals.

7 U.S.C. § 136n gives both the district court and the

court of appeals jurisdiction to review the cancellation of a pesticide registration. That statute provides in relevant part:

> (a) District court review. Except as is otherwise provided in this Act [7 U.S.C. §§ 136 et seq.], Agency refusals to cancel or suspend registrations or change classifications not following a hearing and other final Agency actions not committed to Agency discretion by law are judicially reviewable in the district courts.
>
> (b) Review by court of appeals. In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such order and who had been a party to the proceedings may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has a place of business within 60 days after the entry of such order, a petition praying that the order be set aside in whole or in part.

The parties agree that FIFRA divides jurisdiction between the district court and the court of appeals depending upon whether a "public hearing" has been held. Plaintiffs take the position that a full adjudicatory hearing on cancellation was avoid by the EPA, thus jurisdiction is proper in the district court. Defendant, on the other hand, takes the position that a hearing was held and that the combined administrative efforts create

a record appropriate for review by the court of appeals. Defendant reasons that I should therefore find that a public hearing or its equivalent was held and dismiss for want of jurisdiction.

I find that jurisdiction is proper in the district court pursuant to 7 U.S.C. § 136n(a) for the following reasons. First, there is support within this circuit for such jurisdiction. In *AMVAC Chemical Corp. v. U.S. E.P.A.*, 653 F.2d 1260 (9th Cir. 1980) the court held that a similar type of administrative record did not constitute a "public hearing" and noted that if an agency acts without a hearing, the judicial review should be in the district court. *AMVAC*, 653 F.2d at 1263, n.7. The opinion cites legislative history demonstrating that Congress intended review in the court of appeals only after a full hearing, when a sufficient record has been developed to enable the court to adequately assess the legal propriety of agency action. *Id.*

Defendant urges me to follow the reasoning of *Environmental Defense Fund v. Costle*, 631 F.2d 922 (D.C. Cir. 1980) which held that a "public hearing" under FIFRA occurs when an administrative decision and record are created and can be reviewed. The dissent in *AMVAC* concurred with this reasoning but the majority rejected

it.

The Ninth Circuit's opinion in *Love* offers additional guidance on this question. There the court rejected the defendant's suggestion that it defer to the EPA's construction of the judicial review provisions of FIFRA. Noting that ordinarily great weight is given to an agency's interpretation of a statute, "that deference does not extend to the question of judicial review, a matter within the peculiar expertise of the courts." *Love*, 838 F.2d at 1064, n.9. Moreover, the court noted that the courts have long recognized a presumption in favor of judicial review of administrative actions and have narrowly construed prohibitions against judicial review. *Love*, 838 F.2d at 1067.

FIFRA contemplates a full adjudicatory hearing when a cancellation is in issue and this is an additional ground for jurisdiction in the district court. The required hearing for cancellation is of the type called for in 5 U.S.C. §§ 554 and 556 of the Administrative Procedures Act (APA). These sections permit adversarial safeguards including notice, right to counsel, right to introduce evidence, right to cross-examine and the right to subpoena witnesses. It is clear that no such adjudicatory hearing process occurred here.

Yet another ground for finding jurisdiction is that the order, as it affects existing stock usage, was not the subject of any hearing. Therefore, if the combined administrative record does constitute a "public hearing" on the registration cancellation giving jurisdiction to the court of appeals, there can be no such denial of this court's jurisdiction regarding usage of existing stocks. The Administrator admits that no hearing was held on this issue. This court has jurisdiction of this issue under 7 U.S.C. § 136n(a).

The Cancellation Order

In determining whether to enjoin enforcement of the cancellation order I review the agency decision for arbitrary and capricious action. 5 U.S.C. § 706(2)(A).

Plaintiffs contend that the agency's decision to permit temporary usage on peas and caneberries, but not on beans and cucurbits is arbitrary, pointing out that the alleged risk of use is to the applicator and, hence, constant for all these crops. Plaintiffs also prove that there is no effective alternative registered herbicide for any of these crops. Plaintiffs further contend that the agency decision to eventually prohibit all usage of dinoseb is arbitrary because its assessment of risk runs counter to the evidence of risk established by the studies

of the various manufacturers.

Indeed, EPA's own Scientific Advisory Panel, which studied the data base relied upon by the agency, informed the agency that it could not conclude the margin of safety for applicators was below an acceptable level. The panel issued a report on October 31, 1986 recommending that the agency seek additional studies but the agency refused to follow that recommendation. The manufacturers therefore conducted their own studies including actual field worker exposure studies. Plaintiffs' expert witness, Wendell W. Kilgore, who was a member of the panel at that time, testified that he reviewed those studies and concludes that the EPA did lack a sufficient basis for assuming parallel human toxicity. He further testified that were he now a member of the panel he would support continued use of dinoseb.

I find that the Administrator's acts are arbitrary and capricious. This court earlier found, and the Ninth Circuit has agreed, that the agency failed to comply with the law. *Love*, 668 F. Supp. at 1443, 838 F.2d at 1059. Any action by the agency cancelling registration of the chemical dinoseb without following the law is necessarily arbitrary, capricious and unlawful.

The evidence of risk suggests that the dangers of

dinoseb are far less than assumed by the EPA. Further, before the Administrator can cancel use of a chemical due to unreasonable adverse effects on the environment, he must balance the economic, social and environmental costs and benefits of that action. 7 U.S.C. § 136d(b). This, the EPA has failed to do. Such agency action is arbitrary and capricious.

The Preliminary Injunction

As discussed above, the plaintiffs are likely to succeed on the merits of this case. Further, they face irreparable injury. That irreparable injury is the far-reaching and serious economic harm that this court and the Ninth Circuit has already recognized and outlined in the *Love* case. *See, e.g., Love*, 838 F.2d at 1072-73 (crop losses could result in business failures for farmers and food processors; community stability could be profoundly and adversely affected).

Conclusion

This court and the court of appeals have found that the defendant acted arbitrarily in suspending dinoseb without properly considering its benefits and risks. *Love v. Thomas*, 668 F. Supp. 1443 (D. Or. 1987), *aff'd in part, rev'd in part*, 838 F.2d 1059 (9th Cir. 1988). Defendant would now avoid that obligation by approving a

settlement agreement between the EPA and the two remaining dinoseb manufacturers. Such an agreement has the effect of cancelling all registration of dinoseb, without properly balancing the benefits and risks. Plaintiffs are entitled to an injunction prohibiting enforcement of the cancellation order.

DATED this 17th day of June, 1988.

/s/ James A. Redden
JAMES A. REDDEN
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

NORTHWEST FOOD PROCESSORS ASSOCIATION, non-profit association, JAMES M. LOVE, TUALATIN VALLEY FRUIT MARKETING, INC., an Oregon corporation, AMERICAN FROZEN FOOD INSTITUTE, a non-profit association,
Petitioners,

v.

LEE M. THOMAS, Administrator, Environmental Protection Agency,
Respondent.

Petition for Review Under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 USC § 136 et seq.

From

Cancellation Order of June 10, 1988 of Lee M. Thomas, Administrator, Environmental Protection Agency

In

In re: Cedar Chemical, et al., FIFRA Nos. 590 et al.

[Filed June 15, 1988]

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Of Attorneys for Petitioner
American Frozen Food
Institute

Of Attorneys for Petitioners
Northwest Food Processors Association,
James M. Love, and Tualatin Valley
Fruit Marketing, Inc.

Petitioner hereby petitions this Court (1) to review and set aside an action of the respondent contained in respondent's Final Order of June 10, 1988 cancelling all remaining registrations of all products containing dinoseb, and (2) to review, enjoin, and declare invalid the on-going course of conduct by respondent involving suspension and/or cancellation of products containing dinoseb. As set forth in detail hereinafter, petitioner

contends that respondent's actions violate Section 6 of FIFRA and are arbitrary, capricious, and an abuse of discretion.

This petition is being filed precautionarily. Petitioner filed on June 1, 1988 in the United States District Court for the District of Oregon a complaint containing the allegations appearing hereinafter and seeking injunctive relief. While the District Court seemingly has jurisdiction under FIFRA and *AMVAC Chemical Corp. v. U.S.E.P.A.*, 653 F2d 1260 (9th Cir 1980), under Judge Goodwin's dissent in *AMVAC*, initial jurisdiction exists in the Ninth Circuit. Because of that dissent and the possibility this Court might ultimately adopt the views of Judge Goodwin, this petition is being filed to preserve Ninth Circuit jurisdiction if it now exists.

PARTIES

1. Plaintiff Northwest Food Processors Association ("NWFPA") is a non-profit trade association of seventy fruit, vegetable and potato growers and processors in Oregon, Washington and Idaho. NWFPA has represented Northwest grower and processor companies since 1914, and its members account for over 90 percent of the Northwest's production of processed fruits and vegetables. Many of the members of NWFPA are also

members of plaintiff American Frozen Food Institute.

2. Plaintiff James M. Love resides in Forest Grove, Oregon, is a co-owner of Love Farms, and is a member of NWFPA.

3. Plaintiff Tualatin Valley Fruit Marketing, Inc. is an Oregon corporation which maintains its principal place of business in Cornelius, Oregon. Tualatin Valley Fruit Marketing, Inc. is a grower and processor of berry crops, and is a member of NWFPA.

4. Plaintiff American Frozen Food Institute ("AFFI") is a non-profit trade association of 506 frozen food processors and associated industries throughout the nation. AFFI has represented frozen food companies since 1942, and its members produce approximately 80 percent of the nation's total yearly production of frozen foods. The total yearly production is valued at approximately $80 billion.

5. Defendant Lee M. Thomas ("Administrator") is the Administrator of the United States Environmental Protection Agency ("EPA" or "agency").

JURISDICTION

6. The jurisdiction of this Court is based on 7 § USC 136n(b).

CLAIM FOR RELIEF

7. Since 1948, the EPA has issued under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 USC § 136, *et. seq.*, commercial registrations for the sale, distribution and use of pesticide products containing dinoseb, or any of its salts ("dinoseb"). Dinoseb is not registered for home use.

8. Dinoseb is used primarily as a herbicide to control immature broadleaf weeds. Dinoseb is also used as a desiccant on caneberry crops to increase berry yields by suppressing the growth of primocanes and to prepare plants for mechanical harvesting.

9. Since 1948, dinoseb has been used by members of NWFPA and of AFFI on a wide variety of crops, including caneberries (red raspberries, boysenberries, blackberries, and loganberries), cucurbits (squash, pumpkin, cucumber and zucchini), snap beans (green beans, wax beans and romano beans), and green peas.

10. In the Northwest, there are 15,750 acres of caneberry crops which produce 95 percent of the nation's total production; 82,200 acres of green pea crops which produce 54 percent of the nation's total production; 24,200 acres of snap bean crops which produce 20 percent of the nation's total production; and 4,550 acres

of regional cucumbers and yellow squash.

11. NWFPA members harvested 126,700 acres of green peas, snap beans, cucumbers, squash and caneberries in Oregon, Washington and Idaho during 1987.

12. Dinoseb is used on 90 to 100 percent of all red raspberry, blackberry, boysenberry and loganberry crops grown in Western Oregon and Western Washington.

13. Dinoseb is used on 90 to 100 percent of all snap bean crops grown in Western Oregon and Western Washington.

14. Dinoseb is used on 100 percent of all green peas grown in Western Idaho, 100 percent of all green peas grown in Western Oregon and Western Washington, and 60 to 65 percent of the green peas grown in Eastern Oregon and Eastern Washington.

15. Dinoseb is used on 100 percent of all squash (a cucurbit) grown in Western Oregon, 100 percent of the cucumbers (a cucurbit) grown in Western Washington, and 30 percent of the cucumbers grown in Western Oregon.

16. The EPA issued an emergency order suspending the distribution, sale and use of dinoseb effective as of October 7, 1986.

17. On October 14, 1986, the Administrator gave notice in the Federal Register that the continued use of dinoseb during the pendency of a cancellation proceeding involved unacceptable risks to the persons applying the product. The EPA concluded that there was no hazard to persons consuming food that had been treated with dinoseb.

18. Drexel Chemical Company ("Drexel"), Cedar Chemical Corporation ("Cedar"), Uniroyal, Inc., and A. H. Marks & Co. Ltd. ("A. H. Marks") filed during October 1986 requests for hearings to challenge the EPA's entry of the suspension order pursuant to Section 6 of FIFRA, 7 USC § 136d(c). These requests were later withdrawn and a final emergency suspension order ("suspension order") was entered on October 30, 1986.

19. On October 31, 1986, the Scientific Advisory Panel, consulted by the EPA, issued its findings following a review of the data base relied upon by the EPA in determining to enter the suspension order. The panel's significant findings were that: (1) the EPA's estimates concerning the exposure of dinoseb to the skin of applicators were based on weak data and on a lack of actual field data; (2) the EPA's assumptions regarding application rates, hours worked per day, total acres

sprayed, and the degree of skin absorption through protective clothing were based on little information and no actual field data; and (3) the EPA should concentrate on gathering accurate human exposure and absorption data in order to make an accurate risk assessment.

20. On December 1, 1986, Drexel, Cedar, Societe Nationale des Poudres et Explosifs ("SNPE"), and A. H. Marks formed a task force to address and to challenge the EPA's effort to cancel the registrations for dinoseb. This task force is known as the Dinoseb Task Force II.

21. On December 22, 1986, AFFI filed pursuant to 40 CFR § 164.31 a motion for leave to intervene in the cancellation hearings. In accordance with 40 CFR § 164.31(c), leave was granted and AFFI thereby became a party to the cancellation hearing with the full status of the original parties.

22. On January 20, 1987, the American Dry Pea and Lentil Association ("ADPLA") filed with the EPA a petition to modify the suspension order to allow the use of dinoseb on dry peas, lentils and chickpeas in the States of Washington and Idaho.

23. On January 20, 1987, AFFI also filed a petition to modify the suspension order with respect to green peas, snap beans and lima beans.

24. On February 5, 1987, the Department of Agriculture for the State of Washington filed an application for an emergency exemption pursuant to Section 18 of FIFRA, 7 USC § 136p, to allow the use of dinoseb on peas, lentils and chickpeas.

25. On February 6, 1987, the Department of Agriculture for the State of Idaho also filed an application for emergency exemption to allow the use of dinoseb on dry peas, lentils and chickpeas.

26. On February 11, 1987, the NWFPA filed with the EPA a petition to modify the suspension order to allow the use of dinoseb on caneberries, cucurbits, snap beans, and green peas in the States of Oregon, Washington and Idaho.

27. On February 11, 1987, the Oregon Caneberry Commission and the Washington Red Raspberry Growers Association (previously the "Washington Red Raspberry Commission") also filed with the EPA petitions to modify the suspension order to allow the use of dinoseb in the cultivation of caneberries. On March 4, 1987, these growers filed again with the EPA reiterating the need for the agency's immediate attention.

28. On February 13, 1987, the Department of Agriculture for the State of Oregon filed an application

for emergency exemption to allow the use of dinoseb for broadleaf weed control on beans, peas (processed, dried and chickpeas), squash, pumpkins and cucumbers, and as a desiccant for caneberry crops.

29. On February 18, 1987, the EPA published its notice in the Federal Register announcing its decision to hold a hearing concerning the ADPLA's application to modify the suspension order to allow the use of dinoseb on dry peas, lentils and chickpeas. The EPA further gave notice that it was denying the State of Washington's application with respect to green peas, but not dry peas.

30. On February 25, 1987, the Oregonians for Food and Shelter ("OFS"), a non-profit corporation representing 1,500 Oregon-based associations, businesses and individuals, also filed with the EPA a petition to modify the suspension order to allow the use of dinoseb on snap beans, green peas, caneberries and cucurbits.

31. On February 27, 1987, and again on March 5, 1987, the National Food Processors Association ("NFPA") filed with the EPA petitions to modify the suspension order to allow the use of dinoseb on green peas, snap beans and lima beans in Delaware, Maryland, New Jersey, Virginia and Pennsylvania.

32. On March 11, 1987, the Department of

Agriculture for the State of Washington filed additional applications for emergency exemption to allow the use of dinoseb for broadleaf weed control on snap bean and cucumber crops and as a desiccant for raspberry crops.

33. The EPA agreed to hold a hearing with respect to the ADPLA's petition pursuant to 40 CFR § 164.130 and, on March 20, 1987, Administrative Law Judge J. F. Greene (the "ALJ"), recommended that the suspension order be modified to make dinoseb available for use on dry peas, lentils and chickpeas in the States of Washington and Idaho during the pendency of the cancellation proceedings.

34. The ALJ's findings with respect to the ADPLA's petition were that:

(1) there are no current practical alternatives to dinoseb products which are available during the cancellation proceedings;

(2) a ban on dinoseb for this year's growing season will result in a significant economic impact which will be considerably greater than was anticipated by the EPA at the time it gave notice of the suspension in October 1986;

(3) there are reasonable and practical measures which growers may impose on the application of

dinoseb which will reduce the risk of exposure to acceptable levels; and

(4) the benefits of using dinoseb on dry peas, lentils and chickpeas in Washington and Idaho outweigh the risks, during the pendency of the cancellation proceedings.

35. On March 30, 1987, the Administrator adopted the ALJ's recommended decision with respect to ADPLA's petition, and imposed a number of restrictions on the use and methods of applying dinoseb. The Administrator's decision and order was expressly based on finding substantial new evidence regarding: (1) the widespread use and efficacy of dinoseb on dry peas, lentils and chickpeas, (2) the unavailability of and other disadvantages associated with alternative herbicides, and (3) the attendant economic implications associated with a suspension of dinoseb use for these crops in the 1987 growing season.

36. On April 1, 1987, the Administrator denied NWFPA's petition for modification with respect to green peas and snap beans, and ultimately denied the petition with respect to caneberries and cucurbits. The Administrator also denied the petitions of AFFI, OFS and NFPA, and the applications of the States of Oregon,

Washington and Idaho, with respect to green peas, snap beans and lima beans.

37. On April 3, 1987, James M. Love, the Northwest Food Processors Association and Tualatin Valley Fruit Marketing, Inc. filed in district court a complaint and motion for a preliminary injunction to enjoin enforcement of the emergency order suspending the use of dinoseb pending a final cancellation decision.

38. On April 14, 1987, the Dinoseb Task Force II submitted to the EPA preliminary results of a developmental toxicity study of dinoseb applied to the skin of rabbits.

39. On April 15, 1987, the district court found that the EPA's decision to issue an emergency suspension order was arbitrary and capricious and an abuse of discretion. The district court further issued an injunction enjoining enforcement of the suspension order.

40. On or about May 6, 1987, the Dinoseb Task Force II submitted to the EPA a follow-up report on the developmental toxicity study originally submitted on April 14, 1987.

41. On or about May 15, 1987, the Dinoseb Task Force II submitted to the EPA a final report on the developmental toxicity study of rabbits.

42. On or about May 22, 1987, the Dinoseb Task Force II submitted to the EPA a summary and analysis of the final study of developmental toxicity in rabbits.

43. On or about June 1, 1987, the Dinoseb Task Force II submitted to the EPA an interim report on the exposure of actual applicators in the field by ground hydraulic boom sprayers.

44. On or about June 8, 1987, the Dinoseb Task Force II submitted to the EPA a draft final report on dinoseb pharmacokinetics in rabbits.

45. On or about June 17, 1987, the Dinoseb Task Force II submitted to the EPA the final report on the percutaneous absorption of dinoseb in the Rhesus monkey.

46. On or about June 21, 1987, the Dinoseb Task Force II submitted to the EPA the final report on dinoseb pharmacokinetics in rabbits.

47. On or about June 25, 1987, the Dinoseb Task Force II submitted to the EPA an additional interim report on the exposure of actual applicators in the field by ground hydraulic boom sprayers.

48. On June 26, 1987, the Dinoseb Task Force II submitted a proposal to the EPA summarizing the results of the studies completed and submitted to the EPA at

that time, and proposing continued registration with certain additional use restrictions.

49. On July 20, 1987, the EPA responded to the June 26, 1987 proposal and disagreed with its assertions, indicating that a proposal permitting usage of existing stocks, but otherwise cancelling all registrations, might be more favorably received by the agency.

50. On or about August 3, 1987, the Dinoseb Task Force II submitted to the EPA a final report on the exposure of actual applicators in the field by ground hydraulic boom sprayers.

51. On September 16, 1987, the ALJ issued an order rescheduling the cancellation hearing for November 16, 1987.

52. On or about September 23, 1987, the Dinoseb Task Force II submitted to the EPA an amended final report on the exposure of actual applicators in the field by ground hydraulic boom sprayers.

53. The EPA did not submit any of the Dinoseb Task Force II reports to its Scientific Advisory Panel for review and comment.

54. On October 20, 1987, SNPE withdrew its request for a cancellation hearing.

55. The results of the studies submitted by the

Dinoseb Task Force II to the EPA refute fundamental assumptions which underlay the EPA's risk assessment both as to exposure and as to absorption. Consequently, the actual margins of safety for the applicator greatly exceed the margins the EPA estimated, and are at levels in excess of what the EPA has indicated as acceptable for continued usage.

56. On November 13, 1987, the ALJ continued the cancellation hearing indefinitely.

57. On January 7, 1988, the Department of Agriculture for the State of Washington filed an application with the EPA seeking an emergency exemption pursuant to Section 18 of FIFRA, 7 USC § 136p. The State of Washington specifically requested authority to use dinoseb on pea, lentil and chickpea crops.

58. On January 11, 1988, the Department of Agriculture for the State of Idaho also filed an application with the EPA seeking an emergency exemption pursuant to Section 18 of FIFRA, 7 USC § 136p. The State of Idaho specifically requested authority to use dinoseb on pea, lentil and chickpea crops.

59. On January 13, 1988, the EPA filed a motion before the ALJ requesting that she enter an accelerated

decision in favor of the EPA and an order cancelling all remaining registrations for dinoseb. The proposed Cancellation Order of January 13, 1988 provided for the cancellation of all remaining registrations for dinoseb, and continued usage of existing stocks on dry peas, green peas, lentils and chickpeas in Oregon, Washington and Idaho during the 1988 use season and continued usage on caneberries (blackberries, boysenberries, loganberries and raspberries) in Oregon and Washington during the 1988 and 1989 use seasons. The EPA also filed a Rationale for Settlement on January 13, 1988 for the ALJ's consideration.

60. Cedar and Drexel agreed to join the motion for an accelerated decision, though both companies also filed on January 13, 1988 written objections to the motion and proposed Cancellation Order, indicating their disagreement with the EPA's risk assessment.

61. On January 28, 1988, A. H. Marks withdrew its request for a cancellation hearing.

62. On January 28, 1988, the Ninth Circuit Court of Appeals filed its Opinion and entered Judgment in *Love v. Thomas*, 668 F Supp 1443 (D Or 1987), *aff'd in part, rev'd in part*, 838 F2d 1059 (9th Cir 1988). The Ninth Circuit affirmed the district court's jurisdiction and ruled that

entry of the suspension order was arbitrary and capricious, and an abuse of discretion. However, because the injunction order imposed restrictions on the use of dinoseb, the injunction was vacated and remanded for a redetermination of whether to stay the suspension order. The mandate has not yet issued as there is pending before the Ninth Circuit petitions filed by the EPA and certain interveners for a re-hearing and suggestions for re-hearing en banc.

63. On February 4, 1988, AFFI filed an Answer to the motion for an accelerated decision and to the EPA Rationale for Settlement. The Answer objects to the proposed Cancellation Order on the ground that it arbitrarily distinguishes between continued temporary usage on pea and caneberry crops, but not on bean and cucurbit crops, and is without substantial justification.

64. On February 5, 1988, the Department of Agriculture for the State of Washington filed another application with the EPA seeking an emergency exemption to allow use of dinoseb on snap bean crops.

65. On February 12, 1988, the Department of Agriculture for the State of Washington filed another application with the EPA seeking an emergency exemption to allow use of dinoseb on caneberries.

66. On March 1, 1988, the ALJ issued an Order Granting the Joint Motion for an Accelerated Decision and for a Cancellation Order in the Form Proposed.

67. On March 10, 1988, the NWFPA filed a Subpart D petition for modification to permit continued usage of dinoseb on peas, snap beans and caneberries.

68. On March 11, 1988, the ALJ issued an Accelerated Decision and Cancellation Order in favor of the EPA.

69. On March 14, 1988, the EPA also granted the Section 18 emergency applications submitted by the States of Oregon, Washington and Idaho to permit usage on dry peas, chickpeas and lentils. The applications requesting usage on green peas, snap beans, cucurbits and caneberries were denied.

70. On March 22, 1988, AFFI filed exceptions to the ALJ's Accelerated Decision and Cancellation Order objecting on the grounds that the decision to cancel all registrations of dinoseb has not been substantially justified by the EPA, and is contrary to the applicable provisions of FIFRA. AFFI further requested that it be permitted the full public statutory hearing on cancellation provided for by FIFRA.

71. On March 30, 1988, United States Senator

Mark O. Hatfield wrote a letter to defendant emphasizing the importance of dinoseb for the Northwest agriculture industry, the absence of a known and suitable substitute, and the acceptable level of safety that can be achieved with certain use restrictions.

72. On March 31, 1988, AFFI additionally filed supplemental comments to its exceptions to the ALJ's Accelerated Decision and Cancellation Order. The supplemental comments objected to the decision on the ground that it is contrary to law and based on risk estimates which have been disproven by scientific studies made available to the EPA. AFFI further requested that it be permitted the full public statutory hearing on cancellation provided for by FIFRA.

73. On March 31, 1988, the parties which intervened on appeal in the matter of *Love v. Thomas*, 838 F2d 1059 (9th Cir 1988), also filed exceptions to the accelerated decision of the ALJ (hereinafter "intervenors"). The intervenors urged that the Administrator disapprove the settlement, refuse to approve further applications for exceptions to the suspension, and proceed to a full cancellation of all registrations.

74. On April 4, 1988, the NWFPA filed a motion for leave to file comments as amicus curiae and a response

in support of AFFI's exceptions and supplemental comments. NWFPA's response consisted of a letter prepared by its president, David A. Pahl, which urged the EPA not to adopt the proposed Cancellation Order for reasons substantially similar to those urged by AFFI in its objections. The EPA deemed the letter an ex parte communication, but waited until the deadline for filing comments to so notify the NWFPA. NWFPA immediately filed a motion to permit submission of its comments, which motion was then opposed on the grounds that it was filed too late.

75. On April 7, 1988, the EPA filed a memorandum and attachments responding to AFFI's exceptions and supporting the accelerated decision entered by the ALJ.

76. On April 11, 1988, AFFI filed a reply to the intervenors' exceptions to the proposed accelerated decision. The reply clarifies that the mandatory use restrictions of the Cancellation Order demonstrate that dinoseb may continue to be used under conditions which have no unreasonable adverse effect on the environment under Sections 6 and 2 of FIFRA, 7 USC § 136d and 136(bb).

77. On June 10, 1988, defendant adopted the ALJ's accelerated decision and entered a final order cancelling all remaining registrations for all products containing

dinoseb, but permitting temporary usage of existing stocks in accordance with the terms of the ALJ's decision.

78. The Cancellation Order violates Section 6 of FIFRA, 7 USC § 136d(b) because the continued usage of dinoseb on dry pea, green pea, snap bean, cucurbit and caneberry crops would not cause unreasonable adverse effects on the environment. Pursuant to Section 2(bb) of FIFRA, 7 USC § 136(bb), the determination of the existence of unreasonable adverse effects on the environment depends on whether there exists an unreasonable risk to man, taking into account the economic, social, and environmental costs and benefits of use. The agency has failed to consider the economic and social costs and benefits, and has relied on an assessment of the environmental risk which is contrary to actual worker data presented to the agency.

79. The Cancellation Order is in further violation of Section 6 of FIFRA, 7 USC § 136d(a), because the decision to permit the distribution, sale and use of existing stocks of cancelled dinoseb products on dry peas, green peas and caneberries, but not on snap beans or cucurbits, is inconsistent with the purposes of Section 6 of FIFRA, 7 USC § 136d, and fails to make those findings required by Section 6 of FIFRA, 7 USC § 136d(b).

80. The Cancellation Order is in further violation of Section 6 of FIFRA, 7 USC § 136d(b), because the order was entered without a hearing, though such a hearing was requested by AFFI, a party with the full status of the original parties, and a person adversely affected by the Cancellation Order. In addition and as a consequence, defendant failed to assure an objective and competent scientific review of the risks and benefits of continued usage of dinoseb on dry pea, green pea, snap bean, cucurbit and caneberry crops in the Northwest. Such a review was urged by the Scientific Advisory Panel in its findings of October 31, 1986. Instead, defendant issued the Cancellation Order despite the findings of an actual worker exposure study establishing that, with basic use restrictions, dinoseb may be used safely by certified applicators.

81. The Order cancelling all registrations for the manufacture, distribution and use of dinoseb, but permitting temporary usage on some crops and not others, is arbitrary, capricious and an abuse of discretion.

82. During the 1987 growing season, horticultural weed specialists conducted test plot studies to determine the effectiveness of other herbicides in the control of broadleaf weeds in snap bean and pea fields, and in the

control of primocanes. The studies reveal that there are no known alternative herbicides or desiccants that will perform as effectively and as predictably as dinoseb.

83. There are no commercially viable, alternative crops for NWFPA and AFFI members given the Northwest's soil types, climate, existing equipment, processor plants and markets. Furthermore, growers of snap beans and cucurbits are contractually obligated to processors to produce these crops for 1988. Competitive market forces also require processors to deliver these products to wholesale and to retail customers.

84. Without the use of dinoseb on snap bean and cucurbit crops, plaintiffs will suffer estimated economic losses for the 1988 growing season alone of $9.2 million. When it issued the suspension order, the EPA estimated a nationwide economic impact with respect to snap beans of $477,000. EPA never estimated annual economic losses for cucurbit crops. Nor has EPA made any record demonstrating an assessment of the economic losses the Northwest will certainly suffer as a result of arbitrarily precluding beans and cucurbits from the temporary use provisions of the Cancellation Order.

85. Until such time as research demonstrates that an alternative herbicide will perform as effectively and as

predictably as dinoseb, plaintiffs will suffer estimated economic losses for the 1989 growing season of $31.5 million. This estimate excludes the production value of caneberry crops, and includes beans, cucurbits and peas. Additional estimated losses for raspberries and blackberries for 1990 are $5.5 million. The EPA has made no record demonstrating an assessment of the economic losses the Northwest will likely suffer once the temporary usage provisions of the Cancellation Order have expired.

86. Members of NWFPA and AFFI practice the restrictions on usage as they are set forth in the Cancellation Order, and are capable and willing to continue to do so.

87. April 20, 1988, was the initial planting date for snap beans in the Willamette Valley and Western Washington.

88. May 1, 1988, was the initial planting date for snap beans in Northeastern Oregon and Western Idaho.

89. May 10, 1988, was the initial planting date for cucumbers in Oregon and Washington.

90. To the extent initial planting of snap bean and cucurbit crops without dinoseb has occurred, plaintiffs will certainly suffer crop losses during this year's growing season. This injury is irreparable.

91. Dinoseb is applied to snap bean crops in Oregon and Washington through July 5, 1988.

92. Dinoseb is applied to cucumber crops in Oregon and Washington through July 15, 1988.

93. Plaintiffs will suffer additional, significant and irreparable injury if the relief requested is not immediately granted.

94. If the relief requested herein is granted, Drexel Chemical Company will continue to manufacture and to distribute products containing dinoseb for sale and use.

95. Plaintiffs are entitled to recover reasonable attorney fees, costs and other expenses pursuant to 28 USC § 2412(d) of the Equal Access to Justice Act.

WHEREFORE, plaintiffs pray for vacation of the EPA's June 10, 1988 cancellation order and for a judgment entering an injunction restraining defendant from enforcing the Cancellation Order with respect to continued usage of dinoseb on bean, pea, caneberry and cucurbit crops grown in Oregon, Washington and Idaho, and for an award of their costs and attorney fees.

DATED this 10th day of June, 1988.

McEWEN, GISVOLD, RANKIN & STEWART

By /s/ Susan K. Eggum by Charles F. Adams
Susan K. Eggum

STOEL RIVES BOLEY JONES & GREY

By /s/ Phillip D. Chadsey by Charles F. Adams
Phillip D. Chadsey

Of Attorneys for Plaintiffs

COLLIER, SHANNON, RILL & SCOTT

By /s/ John L. Wittenborn by Charles F. Adams
John L. Wittenborn
General Counsel for AFFI

CERTIFICATE OF SERVICE

I certify that on the 14th day of June, 1988, I served a copy of the within PETITION FOR REVIEW on Charles H. Turner, United States Attorney, at 312 United States Courthouse, 620 SW Main Street, Portland, Oregon 97205, by personal service.

I further certify that on the 14th day of June, 1988, I sent copies of the within PETITION FOR REVIEW via Federal Express Delivery Service to the following:

Lee M. Thomas, Administrator
Environmental Protection Agency
Room 537, West Tower
401 M Street, SW
Washington, D.C. 20460

Edwin Meese, III,
U.S. Department of Justice,
Office of the Attorney General,
Main Justice Building, Room 5111
10th & Constitution Avenue, NW
Washington, D.C. 20530

Dated June 14, 1988.

STOEL RIVES BOLEY JONES & GREY

By /s/ Charles F. Adams
Charles F. Adams
Of Attorneys for Plaintiffs

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the matter of:	)	
	)	FIFRA Docket Nos.
Cedar Chemical Company *et al.*	)	590 *et al.*
	)	

[Filed June 10, 1988]

CANCELLATION ORDER

Pursuant to FIFRA section 6(b), 7 U.S.C. §136d(b), and 40 C.F.R. §§164.91 and 164.103, I hereby cancel all registrations for pesticide products containing dinoseb (2-sec-butyl-4,6- dinitrophenol) or any of its salts which have not already been cancelled pursuant to the Notice of Intent to cancel which I issued on October 7, 1986, and which was published at 51 FR 36650, October 14, 1986. Except as provided below, it shall be unlawful under FIFRA sections 12(a)(1)(A) and 12(a)(2)(K), 7 U.S.C. §§136j(a)(1)(A) and (a)(2)(K), for any person in any State to distribute, sell, offer for sale, hold for sale, ship, deliver

for shipment, or receive and (having so received) deliver or offer to deliver to any person any pesticide product containing dinoseb or any of its salts.

Pursuant to FIFRA section 6(a)(1), 7 U.S.C. §136d(a)(1), I have decided to permit distribution, sale, and use of stocks of cancelled dinoseb products: (1) for weed control in dry peas, lentils, chickpeas, and green peas in the States of Washington, Idaho, and Oregon during the 1988 use season, and (2) for vegetative cane control in caneberries (blackberries, boysenberries, loganberries, and raspberries) in the States of Washington and Oregon during the 1988 and 1989 use seasons. Such distribution, sale, and use will only be permitted in accordance with the following procedures, terms, and conditions. No cancelled dinoseb product shall be distributed, sold, or used for any crop in any State without express written authorization from the Assistant Administrator for Pesticides and Toxic

Substances (or his delegate). The Assistant Administrator shall authorize distribution, sale, and use of existing stocks of dinoseb products for a particular crop in a particular State only if the State Department of Agriculture expressly requests in writing that such distribution, sale, and use be permitted, and agrees to accept and enforce all procedures, terms, and conditions set forth in, or adopted pursuant to, this Order.

The following mandatory use restrictions shall be observed by all persons using any cancelled dinoseb product pursuant to this Order, shall constitute supplemental labeling for all cancelled dinoseb products which may be used pursuant to this Order, and shall take precedence over any inconsistent restrictions or provisions on the prior labeling for such products:

(1) Dinoseb shall not be applied at an application rate exceeding three pounds of active (a.i.) per acre for dry peas, chickpeas, and green peas, one and one-half pound a.i. per acre for lentils, and two and one-half pounds a.i. per acre for caneberries.

(2) Dinoseb shall not be applied by any one individual on any single day to more than a total of eighty (80) acres of dry peas, lentils, chickpeas, and green peas, or to more than twenty (20) acres of caneberries.

(3) No individual shall mix and/or load in one day more than the quantity of dinoseb required to treat the maximum permissible daily acreage for one crop at the maximum permissible application rate.

(4) Only certified applicators may mix, load, or apply dinoseb; other persons, even if they are operating under the direct supervision of a certified applicator, shall not mix, load, or apply dinoseb.

(5) All mixing and loading of dinoseb products must be done utilizing a closed system.

(6) All persons must wear chemically resistant disposable coveralls and chemically resistant gloves and boots during mixing and loading of dinoseb, while adjusting or repairing dinoseb application equipment, and during application of dinoseb to caneberries.

(7) Closed tractor cabs equipped with positive pressure ventilization must be used for application of dinoseb to dry peas, lentils, chickpeas, and green peas. Applicators must remove protective coveralls and gloves worn during mixing and loading immediately before entering a closed tractor cab in order to avoid

cab contamination, and must carry an unused set of coveralls and gloves in the cab, for use in the event in-field repair, maintenance, or adjustment of the equipment is required.

(8) Aerial application of dinoseb is prohibited. Dinoseb may only be applied utilizing tractor drawn equipment.

(9) Dinoseb may only be applied to caneberries as a low-pressure directed spray for vegetative cane (primocane) control.

(10) Application of dinoseb is prohibited when wind conditions exceed ten miles per hour.

(11) No person shall re-enter any field treated with dinoseb for any purpose within one week of application unless that person is within a closed cab, or is wearing chemically resistant disposable coveralls and chemically resistant gloves and boots. Any person required to re-enter a field treated with dinoseb within one week of application shall be notified that the field was treated with dinoseb and advised to avoid dermal contact with treated foliage and soil.

The following mandatory restrictions shall govern any distribution or sale of cancelled dinoseb products pursuant to this Order:

(1) No cancelled dinoseb product may be distributed or sold for use on any crop unless: (1) the product was registered, packaged, and labeled on October 7, 1986, or (2) the product was manufactured from stocks of a registered

technical dinoseb product which were packaged and labeled, and in the possession of the manufacturer, on or before October 7, 1986.

(2) No cancelled dinoseb product may be distributed or sold for use on dry peas, lentils, chickpeas, or green peas unless the product was previously labeled for use on peas, lentils, or chickpeas. No cancelled dinoseb product may be distributed or sold for use on caneberries (blackberries, boysenberries, loganberries, and raspberries) unless the product was previously labeled for use on one or more of these crops.

(3) Only pesticide dealers licensed by the State in question may distribute or sell cancelled dinoseb products.

(4) Each container of a cancelled dinoseb product which is distributed or sold must be accompanied by supplemental labeling including all of the use restrictions set forth above, and a warning stating (1) that the product poses a hazard to unborn children and that all reasonable efforts should be made to prevent exposure of women of child-bearing age, (2) that the product also poses hazards to male reproduction, (3) that the product is acutely toxic, and (4) that the product may only be applied by certified applicators.

(5) Dealers may sell dinoseb only to growers who may legally use the product pursuant to this Order, and no grower shall be permitted to purchase a quantity greater than that required to treat the grower's eligible crop acreage at the

maximum permissible application rate. All stocks of dinoseb already in a grower's possession must be taken into account when determining the quantity of dinoseb a grower may lawfully purchase.

(6) Dealers must obtain and record the following information prior to selling, distributing, or delivering any dinoseb product:

(a) The grower's name, address, and certification number (if any),
(b) The type of crop and number of acres to be treated,
(c) The name, address, and certification number of the person(s) who will mix, load, and apply the dinoseb,
(d) The quantity of dinoseb already in the grower's possession,
(e) The product name(s) and registration number(s) of the dinoseb product(s),
(f) The quantity of the dinoseb product(s) to be sold, distributed, or delivered.

All such information shall be forwarded by the dealer to the State Department of Agriculture and the EPA regional office within five days following sale, distribution, or delivery.

The Assistant Administrator for Pesticides and Toxic Substances, in consultation with the Regional Administrator and the Departments of Agriculture of the States of Washington, Oregon, and Idaho, shall establish

procedures for monitoring and enforcement by the States of the restrictions on sale, distribution, and use imposed pursuant to this Order. The Assistant Administrator (or his delegate) may also authorize (1) sale, distribution, or shipment of existing stocks of cancelled dinoseb products by registrants, distributors, dealers, or end-users located in other States to dealers in the States of Washington, Oregon, and Idaho, when sale of existing stocks by the recipient dealer is permitted pursuant to this Order, and (2) any shipments of any cancelled dinoseb product which are necessary to facilitate proper storage or disposal of such products. This Order constitutes final Agency action in the above-captioned proceeding under FIFRA sections 6(b) and 16(b), 7 U.S.C. §§136d(b) and

136n(b), and is a final cancellation order under 40 C.F.R. §164.130.

/s/ Lee M. Thomas
Lee M. Thomas
Administrator

Dated: June 9, 1988

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
	)	
Cedar Chemical Co., et al.	)	
	)	FINAL DECISION
FIFRA 590, et al.	)	
	)	
	)	

On January 13, 1988, Respondent U.S. Environmental Protection Agency and the two remaining registrants of dinoseb pesticide products, Cedar Chemical Corporation and Drexel Chemical Company, filed a joint motion requesting the presiding Administrative Law Judge to enter an accelerated decision in Respondent's favor. If granted, the decision would cancel Cedar's and Drexel's individual dinoseb registrations and would allow restricted use of existing stocks of these cancelled products on certain crops in Oregon, Washington, and

Idaho for limited time periods, ranging from one to two years.[1]

Respondent had entered into separate settlement agreements with each of the registrants, the terms of which called for the filing of the joint motion and, if the ALJ granted the motion, for the entry of a cancellation order in the precise terms proposed by the parties. The ALJ granted the joint motion, which thereafter was timely appealed by the American Frozen Food Institute (AFFI), a party-intervenor in this proceeding. AFFI opposes cancellation and wants EPA to hold a full, public cancellation hearing, but at a minimum seeks a broadening of the existing stocks provisions to include

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[1] The permitted uses are for weed control on dry peas, lentils, chick peas, and green peas in Washington, Idaho, and Oregon during the 1988 use season, and for vegetative cane control on caneberry crops (blackberries, boysenberries, loganberries, and raspberries) in Washington and Oregon during the 1988 and 1989 use seasons.

more crops.[2] Two other groups, which are not parties, have also sought permission to file exceptions: the Natural Resources Defense Council, together with several named individuals (who had previously sought but were denied permission to intervene) and several public interest, labor, and farmworker organizations (collectively referred to as "NRDC"), which favor cancellation but oppose any continued use of existing stocks; and the Northwest Food Processors Association (NWFPA), which, like AFFI, favors continued registration, or, at least, an expansion of the crops on which existing stocks may be used.

For the reasons stated below, I am dismissing all exceptions to the accelerated decision and I am approving the settlement, together with the cancellation order.

The history of this proceeding is a matter of public record and need not be recounted here. Currently, all

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[2] The additional crops are beans and cucurbits.

registrants except Cedar and Drexel have either failed to request a hearing (to contest cancellation of their dinoseb registrations) or they have withdrawn their requests after having initially made them. As a consequence, their registrations have been cancelled by operation of law, and any remaining pesticide products covered by their registrations are barred from commerce (unless, as proposed in the settlement, EPA subsequently authorizes sale and use of the products pursuant to an "existing stocks" determination under FIFRA §6(a)(1), discussed infra at pages 6-13). Because these registrations have been cancelled already, further consideration of the registrability of the products they cover is beyond the scope of this proceeding, for the only remaining registrations at issue are those belonging to Cedar and Drexel.

In AFFI's appeal of the accelerated decision, it argues that the evidence does not support cancellation and that

the existing stocks provisions are not reasonable and appropriate. Neither of these arguments is grounds for overturning the accelerated decision. First, as to the cancellation question, AFFI's analysis is fundamentally flawed: AFFI fails to acknowledge the conclusive legal effect of the registrants' voluntary decision to have EPA cancel their registrations. In the settlement documents, Cedar and Drexel have consented to "the entry by the Administrative Law Judge ('ALJ'), and the EPA Administrator, * * * of a final cancellation order * * * [and] will not seek or otherwise defend continued registration under FIFRA of any of [their dinoseb] pesticide products * * * or concur, assist, or acquiesce in any effort by any other party * * * to secure continued registration of any dinoseb product." Their decision to have EPA cancel their product registrations bars non-registrants such as AFFI from demanding that the registrations remain in effect indefinitely, for FIFRA

§6(a)(1) calls for the mandatory cancellation of such registrations every five years unless the registrant or "other interested person with the concurrence of the registrant" requests that the registration be continued in effect. In this instance there are no registrants left from whom the required concurrence can be obtained; Cedar and Drexel are the sole remaining registrants and they have vowed not to give their concurrence. In *McGill v. Environmental Protection Agency*, 593 F.2d 631, 636-37 (5th Cir. 1979), the court was confronted with a settlement like the one at issue here and recognized that Congress afforded certain limited hearing rights to non-registrants. Nevertheless, the court in construing the statute observed that Congress "intended that users act with the consent of registrants with respect to a commodity actually being produced for some purposes." If non-registrants were given hearing rights not contingent on the consent or cooperation of the registrant, any

consumer could cause "a lengthy and expensive hearing purely on its own volition, even if the registrant and the EPA had reached a settlement agreement the day after the notice was issued," 593 F.2d at 637. The court was unwilling to find "that Congress intended *sub silentio* to tax the fisc with this kind of expense." *Id.*

McGill makes good sense as applied here because further debate over the continued registrability of these dinoseb products is now moot. The decisions of the two registrants to have EPA cancel their product registrations makes weighing the risks of continued dinoseb use against its benefits legally irrelevant in deciding whether the registrations should be cancelled.[3] Cedar and Drexel

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[3] The statutory standard for pesticide registration requires that a pesticide perform its intended function without causing "unreasonable adverse effects on the environment." FIFRA §3(c)(5)(C), 7 U.S.C. §136a(c)(5)(C). The phrase "unreasonable adverse effects on the environment" calls for a weighing of the risks of use against the benefits of use; it is defined as "any unreasonable risk to man or the environment, taking into account the economic, (continued...)

cannot be compelled against their will to produce and market dinoseb products. A FIFRA registration is permissive in nature: it grants permission to sell and distribute pesticide products but the holder of the registration is under no obligation to manufacture and market them. The holder of the registration is at liberty to cease production at anytime, permanently or temporarily. Therefore, unlike certain highly regulated industries such as public utilities, pipelines, and railroads,[4] the pesticides industry does not have to obtain governmental permission to abandon a licensed activity.

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[3](...continued)
social, or environmental costs and benefits of the use of any pesticide." FIFRA §2(bb), 7 U.S.C. §136(bb). The ultimate burden of proof -- *i.e.*, the risk of non-persuasion -- remains at all times on the registrant or other proponent of continued use. *See, e.g.*, Environmental Defense Fund, Inc. (EDF) v. EPA, 548 F.2d 998, 1015-16 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977); EDF v. EPA, 510 F.2d 1292, 1297, 1302 (D.C. Cir. 1975).

[4] *See, e.g.*, United Gas Pipe Line Co. v. FPC, 385 U.S. 83 (1966); Citizens Committee to Save WEFM v. FCC, 506 F. 2d (D.C. Cir. 1974).

In other words, FIFRA is not a statute in which Congress has declared that the production facilities and other property of the industry are "clothed [or affected] with a public interest" so as to grant the public the right, for example, to control production, prices, or marketing decisions.[5] Therefore, as to the cancellation question, AFFI has not established any legal interest in the outcome that gives it the right to contest cancellation of dinoseb registrations.

The existing stocks question involves somewhat different considerations. Although the wording of the proposed cancellation order can arguably be read more narrowly, the Respondent EPA construes the order's existing stocks provision as extending not only to cancelled products covered by Cedar's and Drexel's

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[5] *See* Munn v. Illinois, 94 U.S. 113, 126 (1877) (the public's right arises from an "interest" in the use to which the property is put); Nebbia v. New York, 291 U.S. 502 (1934).

registrations but also to cancelled products covered by previous registrants' registrations, i.e., to registrations held by registrants who either did not request a hearing or who withdrew their requests after having initially made them.* Therefore, Cedar's and Drexel's proprietary rights over the fate of their own stocks (for example, over quantities, uses, and label specifications) is not dispositive of AFFI's interests in the fate of non-Cedar and non-Drexel existing stocks, for these latter products are not tied to what Cedar and Drexel have vowed to do. Therefore, the settlement does not bar AFFI from having a cognizable interest in existing stocks not under the control of Cedar and Drexel.

The presence of this interest, however, does not

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* According to the Respondent, the existing stocks provisions apply to all cancelled dinoseb products, including "hundreds of dinoseb products concerning which a hearing was never requested and which were therefore cancelled by operation of law in November 1986." Memorandum at 15, n.7; *see also* Joint Motion at 5, n.4.

mean that AFFI can demand a hearing as a matter of right if it disagrees with Respondent's findings respecting existing stocks. Respondent contends, and I agree, that FIFRA does not confer hearing rights on persons who disagree with an existing stocks determination.' EPA

' FIFRA does not confer any hearing rights on opponents of an existing stocks determination. Hearing rights in a cancellation proceeding are conferred by FIFRA §§6(b) and (d), whereas existing stock determinations are made under FIFRA §6(a)(1), which vests broad discretion in the Administrator, as the following language demonstrates:

> [T]he Administrator may permit the continued sale and use of existing stocks of a pesticide whose registration is cancelled under [FIFRA §6(b)] * * * to such extent, under such conditions, and for such uses as he may specify * * *.

Existing stocks are not mentioned in the FIFRA hearing provisions, which delineate the scope of hearings on whether a product registration should be cancelled or the classification changed. FIFRA §6(b) ("[T]he Administrator may issue a notice of his intent * * * to cancel a [pesticide's] * * * registration or to change its registration * * * In the event a hearing is held * * *, a decision pertaining to registration or classification issued after completion of such hearing shall be final"); FIFRA §6(d) ("As soon as practicable after completion of the hearing * * *, the Administrator shall * * * issue an order either cancelling

(continued...)

routinely makes provisions for sale and use of existing stocks in the absence of a hearing.' Therefore, even though the settlement by itself does not disqualify AFFI from demanding a hearing on the existing stocks proposal (as it pertains, for example, to existing stocks not controlled by Cedar and Drexel), the absence of any hearing rights under FIFRA ultimately has the same legal

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(...continued)
the registration, changing the classification, denying the registration, or requiring modification of the labeling or packaging of the article"). There is nothing in these hearing provisions to suggest that further hearings are contemplated once the basic cancellation or classification decision takes place. This independence of the existing stocks determination from the hearing requirements is further highlighted by FIFRA §15(b)(2), which authorizes the Administrator to allow use of existing stocks "[n]otwithstanding any other provision of this subchapter" in those instances where registrations have been cancelled because of an "imminent hazard."

' Joint Motion for Accelerated Decision at 5, dated January 13, 1988; EPA Rationale for Settlement at 6, dated January 13, 1988 (hereafter "EPA Rationale").

effect.' It follows then that refusal to hold a hearing on the existing stocks issue is not a basis for overturning the accelerated decision.

' Nevertheless, there are circumstances, as Respondent acknowledges, when existing stocks can be included in a FIFRA cancellation hearing. EPA Memorandum Responding to AFFI Exceptions and Supporting Accelerated Decision at 14, dated April 7, 1988 (hereafter "EPA Memorandum"). The circumstances are limited to situations in which the notice calling the hearing voluntarily identifies and includes existing stocks as an issue for examination. *Id.* This conclusion is consistent with the Agency's decision in *Shell Oil Company, et al.*, FIFRA Dkt. No. 401, April 9, 1979 (Decision on Interlocutory Appeal), which held that the Administrator's cancellation notice establishes a "framework" for the proceeding:

> In procedural terms the notice serves much the same function as a complaint in any other administrative proceeding, and as such, it "set[s] a standard of relevance which shall govern the proceedings at the hearing." [Citation omitted.] Thus, matters falling outside the scope of the notice * * * are of no relevance to the proceeding. Opinion at pp. 10-11.

Obviously, if an issue is identified in the cancellation notice, it fits within the framework of the proceeding and may be litigated in a hearing. In the present instance, the notice calling the hearing did not identify existing stocks as being among the issues for resolution at the hearing.

Does this mean approval of the settlement is automatic once it is determined a hearing is not mandatory? The answer is "no" because the process of reviewing a settlement is an inherently *discretionary* undertaking. Even though the terms of a settlement may meet all requirements for lawful implementation, the terms are nevertheless the result of negotiation and thus embody elements of compromise and trade-off that are made in exchange for resolution of a controversy and for certainty. *See United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975). Therefore, a settlement that meets all legal requirements may be crafted in a variety of ways, any one of which may or may not be attractive to the approving official depending upon that official's perspective. Consequently, approval is not automatic simply because there are no remaining legal hurdles to implementation or, in this case, because a hearing is not

mandatory.

In deciding whether to approve this particular settlement, should AFFI's contentions respecting existing stocks be taken into account even though no hearing will be held? Also, what standard should I apply in judging which parties' views to accept on the existing stocks proposal? The answer to the first question is "yes," for obvious reasons of fairness to AFFI, a party to this proceeding.[10] In view of the wide range of discretion that is incident to any decision to approve or reject a settlement, it would be unfair, at a minimum, to exclude a party's views from consideration merely because no hearing will be held. As to the second question, there is no hard and fast answer. The established procedures do not mandate any specific standard for reviewing the parties' contentions respecting the settlement's existing

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[10] AFFI became a party as the result of a request to intervene under 40 CFR §164.31, not as the result of having requested a hearing under FIFRA §6(b).

stocks provisions." In the absence of any specific criteria, therefore, it is appropriate for me to adopt a standard that is reasonable and consistent with the public interest. Here, I believe that standard should be one of "clear error." In other words, in exercising my discretion to

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" The applicable procedural rules appear at 40 CFR Part 164. The standard that would be applied, for example, in reviewing the record following a hearing -- the preponderance of the evidence standard -- obviously does not apply because there has been no hearing. It is not necessary, however, for the record of this proceeding to contain all of the evidence that would be adduced in an evidentiary hearing, for existing stocks determinations are routinely made "in house" without a formal hearing record. The fact that the procedures employed here have given interested persons an opportunity to participate and to comment at length on the proposed order is *additive* to the procedures ordinarily employed, and the addition of these procedures does not create rights broader than those conferred by FIFRA. The Administrative Procedure Act, 5 U.S.C.A. §551, et seq., does not create any separate hearing rights, since hearings respecting the formulation of orders, such as existing stocks orders, are not required unless the statute under which the order is formulated requires a hearing. *See* Vermont Yankee Nuclear Power v. NRDC, 435 U.S. 519 (1978).

accept or reject Respondent's existing stocks proposal[12] (which normally would be reviewed "in house" without opportunity for public comment), Respondent's recommendation should be accepted unless those who object to it are able to persuade me that it is clearly erroneous, i.e., erroneous as a matter of fact, law, or policy, and therefore should be rejected.[13] This is the basic standard of review that appears in Agency regulations governing numerous other licensing decisions where there is no statutory right to an evidentiary hearing.[14]

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[12] Although the cancellation order containing the existing stocks proposal is the product of a settlement, the existing stocks provisions were drafted entirely by EPA. EPA Rationale at 6.

[13] The burden of demonstrating that the existing stocks determination should be rejected (or subjected to further scrutiny) properly belongs on those who object to the staff's determination, because ordinarily the staff's recommendation would not be open to outside comment until after it had been accepted and become final.

[14] *See* 40 CFR §124.19 (1987) (appeals of hazardous waste treatment, storage, and disposal permits under the (continued...)

In the present instance, AFFI has failed to persuade me that the settlement represents clear error and therefore should be rejected.[15] Respondent's rationale for the settlement[16] contains a detailed analysis of the risks and benefits that would be presented by sale and use of existing stocks under the restrictions and other terms of the proposed cancellation order. In my opinion, Respondent's rationale fully satisfies the substantive

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[14](...continued)
Resource Conservation and Recovery Act, underground injection control (UIC) permits under the Safe Drinking Water Act, and prevention of significant deterioration (PSD) permits under the Clean Air Act).

[15] Because the settlement is contingent upon its acceptance in the form presented by the parties in the joint motion, any revision of its terms would constitute its rejection. Nevertheless, as the Respondent has suggested, the Administrator may communicate any concerns about the terms of the existing stocks proposal to the parties (EPA and the two registrants) so that they can consider amending the settlement to allay the concerns. As stated in the text above, however, I see no clear error in the existing stocks proposal; therefore, I see no need to refer it back to the parties for possible amendment.

[16] EPA Rationale for Settlement, dated January 13, 1988.

statutory standard for an existing stocks determination, which appears in FIFRA §6(a)(1) as follows:

> [T]he Administrator may permit the continued sale and use of existing stocks * * * if he determines that such sale or use is not inconsistent with the purposes of [FIFRA] and will not have unreasonable adverse effects on the environment.

Respondent further explained the rationale and responded to AFFI's criticisms on two separate occasions in this proceeding. *See* Respondents' Reply to AFFI Objections to Joint Motion for Accelerated Decision at 10-16 (dated February 11, 1988); Respondent's Memorandum Responding to AFFI's Exceptions, Etc. 14-26 (dated April 7, 1988); *see also* EPA Response to Ex Parte Communication (dated April 12, 1988). Together with the rationale itself the responses form a detailed and well justified articulation of the reasons why EPA is able to conclude that the existing stocks proposal will not cause unreasonable adverse effects on the environment and is otherwise consistent with the purposes of FIFRA. In fact, they show that the depth of the Agency's review in making the proposal is probably the most rigorous this Agency has ever undertaken for a small number of

minor crops in a single geographical region." It is readily apparent that Respondent has given full consideration to all of AFFI's concerns or criticisms and has refuted or addressed them as the case may be. There is no compelling reason to look behind Respondent's recommendation respecting existing stocks." I therefore conclude that the recommendation is in the public interest. Furthermore, I adopt Respondent's rationale (together with supporting responses) as the Agency's final statement of reasons in support of the existing stocks proposal in the proposed cancellation order.

The NRDC *et al.* and the NWFPA are not parties to this proceeding but are nevertheless seeking to have their exceptions to the settlement considered in the final decisionmaking process. In response, Respondent correctly points out that the applicable procedural rules, 40 CFR §164.102, make no provision for the filing of exceptions to an accelerated decision by non-parties. However, although I am not aware of any legal reason for not applying these rules exactly as they are written, I have the prerogative to relax a procedural requirement if

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" Respondent's Memorandum at 19.

" *See* notes 12 and 15 supra.

no prejudice will result to any party and if the circumstances appear to warrant it." In the case of NWFPA, there is no compelling reason to relax the rules because NWFPA has not shown any legitimate reason for seeking late entry in the proceeding and its interests are not substantially different from those of AFFI's. I therefore deny NWFPA's motion to file comments (together with its motion to file them out of time).

NRDC's situation is distinguishable because some individual members that make up this group of petitioners had sought to intervene earlier but their requests to do so were denied by the presiding officer.[*]

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[*] "'[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.'" American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970) (quoting NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953)); *see* Rockwell International Corporation, TSCA Appeal No. 87-5, at 2, n.2 (CJO October 23, 1987) (non-party allowed to request certification of interlocutory appeal under rules permitting certification only "upon motion of a party").

[*] The individuals who had previously sought unsuccessfully to intervene in the proceeding did not request, as the rules expressly authorize, that the presiding officer's adverse ruling be certified to the Administrator for a "speedy [interlocutory] appeal." *See* 40 CFR §164.31(c).

Also, NRDC's views are not represented by any other party insofar as the existing stocks proposal is concerned. Therefore, I believe it is appropriate to relax the rules to allow NRDC's objections to be received as a non-party amicus curiae. As to the substance of the objections, NRDC makes two general arguments: it opposes, as unlawful, gender-specific restrictions on use of existing stocks, as were prescribed earlier in the October 7, 1986 suspension order, 51 FR 36634 (October 14, 1986); and it claims any continued use of existing stocks for even a limited time period poses unacceptable risks to workers generally (and to their families and neighbors), not only to pregnant women. The first argument is countered by the fact that the proposed cancellation order no longer contains any gender-specific *restrictions* but instead replaces them with *warnings* that the product poses hazards to male reproduction and unborn children and that all reasonable efforts should be made to prevent exposure of women of childbearing age. These are supplemented by gender-neutral restrictions respecting when workers can re-enter treated areas and with a host of specific label directions governing application procedures and protective equipment. NRDC's second argument is countered by its failure, in my opinion, to

weigh adequately the risks of limited dinoseb use against its benefits, for the crops and time periods in question. NRDC has not convinced me that the limited and short-term availability of existing stocks is unjustified in view of the controlled circumstances under which they will be used and the benefits they afford while affected growers and others make the transition to alternatives. Consequently, I am not persuaded by NRDC's arguments.[3]

For the reasons stated, the accelerated decision is affirmed[4] and all remaining dinoseb registrations are cancelled in accordance with the terms of the cancellation order accompanying this decision.[5] The cancellation

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[3] In view of the foregoing, Respondent's and AFFI's separate requests to file responses to NRDC's exceptions are denied.

[4] In accordance with 40 CFR §164.91 (1987), an accelerated decision may be rendered in favor of Respondent whenever "(7) [t]here is no genuine issue of any material fact and * * * the respondent is entitled to judgment as a matter of law; or (8) [s]uch other and further reasons as are just."

[5] The cancellation order accompanying this decision supersedes the cancellation order executed by the presiding officer on March 11, 1988. Today's order is identical in content to the one submitted by EPA, Cedar, and Drexel as part of the joint motion requesting an accelerated decision

(continued...)

order shall become effective at the date and time it is filed with the hearing clerk.[4]

/s/ Lee M. Thomas
Lee M. Thomas
Administrator

Dated: June 9, 1988

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[3](...continued)
in EPA's favor. The March 11 order never became effective as a result of the appeal of the accelerated decision. *See* 40 CFR §164.91(b); 40 CFR §164.90(b).

[4] AFFI's motion for leave to file its reply, etc., dated April 21, 1988, is denied.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Cedar Chemical Company *et al.*	)	FIFRA Docket Nos. 590 *et al.*

RESPONSE OF DINOSEB TASK FORCE II TO EPA RATIONALE FOR SETTLEMENT

The purpose of this document is to state the support of Petitioner Dinoseb Task Force II for the terms of the settlement entered into today between members of the Task Force, namely Cedar Chemical Company and Drexel Chemical Company, and EPA, and to respond to certain elements of the Agency's rationale for settlement.

Petitioner believes that the reasons given by EPA for permitting use of existing stocks on certain commodities under specified use conditions are amply justified by the record available to EPA and the Administrative Law Judge. In particular, the record and decision in the Subpart D proceeding, FIFRA Docket No. 612, reflected the significant benefits of dinoseb use on dry peas, lentils, and chickpeas in the Pacific Northwest, as well as the protection of health provided by the use restrictions developed in that proceeding. (Test data produced in the 1987 use season on potential alternatives to dinoseb use

on these commodities have confirmed these benefits, and experience with implementation of the use restrictions in the 1987 use season has confirmed their enforceability.) Both EPA's statement of the benefits of dinoseb use (including lack of any alternative) on caneberries, and its finding of a lack of adequate alternatives for use on green peas under the climatic conditions of the Pacific Northwest, are fully supported by the record before EPA.

While supporting the terms of the instant settlement, the Task Force substantially disagrees with the Agency's allegations of risk associated with dinoseb use. The combination of studies commissioned by the Task Force (including a field test of worker exposure and a study of dinoseb dermal penetration), which have been provided to EPA, showed in particular that mixer/loader and applicator exposure is actually a fraction of that assumed by EPA, and that the margins-of-safety for dinoseb use on various commodities are accordingly substantially higher than those estimated by the Agency.[1]

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[1] EPA in fact steadfastly refused to acknowledge the problems of a "surrogate" exposure database with purported exposure values skewed over three orders of magnitude--at the same time refusing to concede the greater relevance and utility for this case of an applicator study that

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Notwithstanding its disagreement with EPA's assessment of dinoseb risks, the Task Force joins in the settlement based on several factors, including the terms of the settlement regarding use of existing stocks and the commitments of EPA regarding procedures and deadlines for indemnification and disposal. A further primary basis for the decision to settle is the Task Force's assessment of the resources that would be required to make its case for continued registration of dinoseb in the cancellation hearing.

Respectfully submitted,

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measured dinoseb exposure under actual field conditions, evaluated the potential of dinoseb to penetrate fabric protection, and measured exposure rates in a realistic unit of measurement (*i.e.*, based on the amount of product handled rather than the time involved in handling).